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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1936

No. 309

S. P. KELLY, TRUSTEE IN BANKRUPTCY FOR THE CARLISLE PACKING COMPANY, A CORPORATION, BANKRUPT, PETITIONER,

vs.

THE UNITED STATES OF AMERICA AND THE COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 24, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 309

S. P. KELLY, TRUSTEE IN BANKRUPTCY FOR THE CARLISLE PACKING COMPANY, A CORPORATION, BANKRUPT, PETITIONER,

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 33183

In the Matter of

CARLISLE PACKING COMPANY,

a corporation,

Bankrupt.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

RALPH O. OLSON,
Bellingham Natl. Bank Bldg.,
Bellingham, Wash.,

GEORGE V. WHITTLE, C. P. A.,
Smith Tower, Seattle, Wash.,

STRATTON & KANE,
Smith Tower, Seattle, Wash.,
Attorneys for S. P. Kelly, Trustee and Appellant.

J. CHARLES DENNIS,
United States Attorney,

GERALD SHUCKLIN,
Ass't. United States Attorney,

THOMAS R. WINTER,
Special Attorney, Bureau of Internal Revenue,
all of Seattle, Washington,
Attorneys for United States of America, Claimant.

BE IT REMEMBERED, that on the 9th day of February, 1934, upon an involuntary petition, filed on the 19th day of January, in the District Court of the United States for the Western District of Washington, Northern Division, an order of adjudication in bankruptcy was made and filed, which is in words and figures, as follows, to wit: [1*]

[Title of Court and Cause.]

ADJUDICATION OF BANKRUPTCY AND ORDER OF REFERENCE.

At Seattle, Washington, in said district on the 9th day of February, A. D. 1934, before the Honorable Edward E. Cushman, Judge of said court in bankruptcy, the petition of George V. Whittle, Sebastian-Stuart Fish Company and Toralf Hansen that Carlisle Packing Company be adjudged bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Carlisle Packing Company, a corporation, is hereby declared and adjudged bankrupt accordingly. It is therefore

ORDERED that upon the petition filed in this court against said bankrupt on the 19th day of January, 1934, said matter be referred to Tim Healy, Bellingham, Washington, as a special referee in bankruptcy of this court, he to give a bond not later than Feb. 14th in the sum of One Thousand Dollars and otherwise duly qualify for such office, to take such further proceedings therein as are required by said acts and that the said Carlisle Packing Com-

*Page numbering appearing at the foot of page of original certified Transcript of Record.

pany, a corporation, shall attend before said referee on the 15th day of February, 1934, at his office, Bellingham, Washington, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said bankruptcy.

WITNESS the Honorable Edward E. Cushman, Judge of said Court, and the seal thereof, at Seattle, Washington, in said district, on the 9th day of February, 1934.

[Seal] ED M. LAKIN,
Clerk.
By F. W. MOSES,
Deputy Clerk.

Enter:

EDWARD E. CUSHMAN, Judge.

[Endorsed]: Filed Feb. 9, 1934. [2]

That thereafter and on the 1st day of June, 1934, a statement of claim for taxes due the United States was filed herein, which is in words and figures, as follows, to wit:

[Title of Court and Cause.]

STATEMENT OF CLAIM FOR TAXES DUE THE UNITED STATES.

Comes Alex McK. Vierhus, Collector of Internal Revenue for the Collection District of Washington, a duly authorized agent for the United States in this behalf, and says that Carlisle Packing Company, Bankrupt, is justly and truly indebted to the United States of America for Internal Revenue Taxes as follows:

Nature of Tax and Statute Involved.	Taxable Period.	Amount of Tax.	Interest Provisions.
SEE STATEMENT ATTACHED			

That no part of said taxes or interest has been paid but that the same are now due and payable at the office of said Collector of Internal Revenue at Tacoma, Washington.

That no security therefor is held by the United States and that there are no set-offs or counter-claims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by Section 3466 of the Revised Statutes and Section 64(a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Dated this 29 day of May, 1934.

ALEX McK. VIERHUS,
Collector of Internal Revenue for the Collection District of Washington.

Sworn to and subscribed before me this 29 day of May, 1934.

[Seal] E. G. CLARKE,
Notary Public in and for the State of Washington, residing at Tacoma. [3]

STATEMENT OF TAXES DUE FROM CARLISLE PACKING COMPANY

Nature of Tax and Statute Involved	Taxable Period	Amount of Tax		Interest Provisions
Additional income taxes assessed under Sec. 279 of the Revenue Act of 1926 and Sec. 273 of the Revenue Act of 1928 respectively.	1927	Tax	12429.82	Plus statutory interest of 6% per annum from 1/12/34 to date paid.
		Int. to 1/12/34	4407.65	
		Total	$16837.47	
	1928	Tax	1435.49	
		Int. to 1/12/34	422.90	" "
		Total	$1858.39	
	1929	Tax	1473.88	
		Int. to 1/12/34	345.78	" "
		Total	$1819.66	
TOTAL 1927, 1928, 1929 ASSESSMENTS			$20515.52	Plus interest as stated above.

[4]

That thereafter and on the 18th day of June, 1934, trustee in bankruptcy in said cause, S. P. Kelly, filed objections to the said claim and requested that the same be rejected, which was in words and figures, as follows, to-wit:

[Title of Court and Cause.]

OBJECTION TO CLAIM FOR TAXES.

"The Government's claim filed herein for Federal Income Taxes, covering the years 1927, 1928, and 1929 in the amount of $20,515.52, plus accrued interest, is rejected for the following reasons:

"For the year 1927 the transfer of certain properties of the bankrupt was made to the Bank of California for and in consideration of the cancellation of $650,000.00 of notes representing loans which had been theretofore made to the bankrupt corporation; that in the aforesaid transaction the bankrupt corporation received no taxable income and therefore there is no income tax due for the year 1927, and since there is no taxable income for the year 1927, the losses of prior years and the loss for the year 1927 are an allowable deduction from any taxable income for the years 1928 and 1929, and that said losses so allowed to be carried forward as a deduction eliminate any taxable income in the years 1928 and 1929. Therefore, on the above basis, there was no

taxable income for the years 1927, 1928, and 1929." [5]

[Title of Court and Cause.]

BE IT REMEMBERED, that on the 18th day of July, 1934, the objections to the allowance of the claim of the United States Government for taxes came on for hearing in the above entitled court before the Special Referee in Bankruptcy, and the following proceedings were had and done:

ABSTRACT OF RECORD

(of Proceedings had Before the Referee.)

Upon objections to the allowance of the claim of the United States Government the above-entitled matter came on for hearing on the 18th day of July, 1934, before Hon. Tim Healy, Special Referee in Bankruptcy, at Bellingham, Washington, pursuant to notice of hearing theretofore given.

Appearances:

Ralph Olson,
Murray L. Jones,
George V. Whittle, C. P. A.,
Attorneys for S. P. Kelly, Trustee.
J. Charles Dennis, United States Attorney,
Warren G. Magnuson,
Asst. United States Attorney,
Thomas R. Winter, Special Attorney,
Bureau of Internal Revenue,
Attorneys for United States of America.

[6]

The objections filed by the Trustee in Bankruptcy, S. P. Kelly, to the allowance of the claim of the United States are as follows:

> "The Government's claim filed herein for Federal Income Taxes, covering the years 1927, 1928, and 1929 in the amount of $20,515.52, plus accrued interest, is rejected for the following reasons:
>
> "For the year 1927 the transfer of certain properties of the bankrupt was made to the Bank of California for and in consideration of the cancellation of $650,000.00 of notes representing loans which had been theretofore made to the bankrupt corporation; that in the aforesaid transaction the bankrupt corporation received no taxable income and therefore there is no income tax due for the year 1927, and since there is no taxable income for the year 1927, the losses of prior years and the loss for the year 1927 are an allowable deduction from any taxable income for the years 1928 and 1929, and that said losses so allowed to be carried forward as a deduction eliminate any taxable income in the years 1928 and 1929. Therefore, on the above basis, there was no taxable income for the years 1927, 1928, and 1929."

After opening statements by counsel the following proceedings were had:

Mr. WINTER: If the Court please, in addition to the proof of claim heretofore filed the

United States offers in evidence and as a part of the proof of claim a certified copy of the decision of the United States Board of Tax Appeals promulgated December 6, 1933 reported in 29 B. T. A. 514 (333 C. C. H. 7514), two certified copies of the orders of deficiency entered and dated by the United States Board of Tax Appeals January 4, 1934 on the appeals of the Carlisle Packing Company from the deficiencies in tax set forth in the claim filed; certified copy of assessment list showing assessment of tax in accordance with the decision and orders [7] of the United States Board of Tax Appeals.

The decision of the United States Board of Tax Appeals, Claimant's Ex. 2, is as follows:

CLAIMANT'S EXHIBIT 2.
(Duly certified.)

United States Board of Tax Appeals

CARLISLE PACKING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket Nos. 55209, 64926. Promulgated December 6, 1933.

Petitioner transferred to its creditor property having a depreciated cost of $346,106.87, and received back canceled notes in the amount

of $650,000 given to the creditor in prior years for loans. HELD, that petitioner thereby realized a taxable gain in the amount of the difference between the cost of the property and the face amount of the notes.

Chas. A. Wallace, Esq., and George B. Whittle, C. P. A., for the petitioner.

Warren F. Wattles, Esq., for the respondent.

OPINION.

ARUNDELL: This proceeding has been brought to test the correctness of the respondent's determination that a profit was made by petitioner in the disposition of certain of its plants and equipment to the Bank of California, National Association, during the fiscal year 1927. Deficiencies have been asserted for the fiscal years November 30, 1927, 1928, and 1929 in the respective amounts of $12,429.82, $1,435.49, and $1,473.88. It is petitioner's contention that the disposition of its plants and equipment in 1927 under the circumstances hereinafter related did not result in taxable gain, and that, if respondent's determination is corrected in this particular, then by reason of the net loss provisions of the statute the deficiencies for the fiscal years ended November 30, 1928 and 1929 will be wiped out. The evidence presented consisted of a stipulation of facts and the oral testimony of several witnesses.

It appears that the petitioner is a corporation, organized and existing under the laws of the State

of Washington, and for a number of years has been engaged in the business of salmon fishing and packing, with plants in both Alaska and the State of Washington. The company had been successfully operated, particularly during the years 1917, 1918, and 1919, and on January 20, 1920, its book surplus was $1,017,749.22. Thereafter and for the next five years the petitioner suffered heavy losses. For the fiscal year ended November 30, 1926, it had net income of $24,982.28, without adjustment for losses of previous years. In order to carry on it started in 1920 to borrow various sums from the Bank of California, National Association (Seattle branch), and by February 15, 1927, its indebtedness to that institution approximated $1,250,000, evidenced by promissory notes made by petitioner and its president and sole stockholder, Frank Wright.

Early in 1927 the Bank of California advised Wright that the bank would not finance petitioner during the coming fishing season and demanded that petitioner liquidate its indebtedness to the bank. [18] After some negotiations petitioner agreed to and did transfer and convey to the Bank of California its canneries at Cordova and Bristol Bay, Alaska, together with certain equipment, boats, docks, land, etc., all of which is set forth and described in an instrument of transfer which was introduced in evidence as exhibit A to the stipulation of the parties. All of the property was taken over by the Bank of California at an agreed price of $650,000 and at the same time petitioner was

given its canceled notes in that amount. This transaction was consummated on February 15, 1927. Thereafter, and on or about February 21, 1927, the Bank of California completed negotiations begun about February 1, 1927, and sold the plant and equipment, etc., at Cordova, Alaska, to the New England Fish Co. for the sum of $300,000; and on or about February 22, 1927, the bank sold the Bristol Bay plant and equipment, etc., to the Alaska Packers Association for the sum of $350,000, making a total of $650,000. The respondent determined that the depreciated cost of the property sold, both tangible and intangible, was $346,106.87, and the petitioner apparently does not dispute this figure. Based thereon the respondent determined that the petitioner realized a profit by the above described transaction in the amount of $303,893.13.

It seems to us that on these facts the respondent must prevail. If the petitioner had directly sold the assets in question for $650,000 in cash and had used the money to pay the bank, there would be no question but that the profit so realized was taxable. It is none the less realized where the petitioner had first received the money by way of borrowed funds. The cancellation of petitioner's indebtedness to the Bank of California in the sum of $650,000 constituted a realization of gain on the disposition of its property. Cf. United States v. Kirby Lumber Co., 284 U. S. 1. In Hagan Corp. 21 B. T. A. 41, the taxpayer delivered stock of another corporation, that cost it $16,000, to its creditor and received its

notes in the face amount of $31,901.03, which it had given the creditor in a prior year. We sustained the Commissioner's determination that a profit of $15,901.03 had been realized on the transaction, saying in part:

The petitioner gave value for what it got and it received a valuable consideration for what it gave. It had a gain derived from capital, from labor, or from both combined. Eisner v. Macomber, 252 U. S. 189. A solvent corporation had its outstanding notes in the amount of $31,901.03 returned to it for some services performed and/or some stock value which cost it $16,000. It does not matter if, as contended by the petitioner, these notes were originally given for a capital asset. We are not particularly concerned with the original transaction nor with the proper treatment of what was acquired in that transaction. It is sufficient for present purposes to know that after the petitioner received its own notes, it had income or a profit amounting to $15,901.03 which it has never reported for tax purposes and which it could not have reported properly at any other time.

We accordingly hold that the petitioner realized taxable profit on the transaction here involved, and

Decision will be entered for the respondent. [19]

United States Board of Tax Appeals
Washington

United States of America,
District of Columbia—ss.

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, hereby certify the foregoing and

attached to be true and correct copies of the OPINION in Docket Numbers 55209-64926, wherein CARLISLE PACKING COMPANY, is Petitioner and the Commissioner of Internal Revenue is Respondent.

In testimony whereof I hereunto subscribe my name and affix the seal of said Board of Tax Appeals at the city of Washington in said District this 11th day of June, 1934.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

United States Board of Tax Appeals
Washington

Docket Nos. 55209-64926

CARLISLE PACKING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

I, Eugene Black, chairman of the United States Board of Tax Appeals, the same being an independent agency in the executive branch of the Government, do hereby certify that B. D. Gamble is clerk of said Board and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Washington, D. C., this 11th day of June, 1934.

[Seal] EUGENE BLACK,
Chairman,
United States Board of Tax Appeals. [20]

United States Board of Tax Appeals
Washington

Docket Nos. 55209-64926

CARLISLE PACKING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, do hereby certify that Eugene Black, whose name is subscribed to the foregoing certificate, was at the time of subscribing the same Chairman of the United States Board of Tax Appeals, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Board at Washington, D. C., this 11th day of June, 1934.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals. [21]

The orders of deficiency in tax, Claimant's Ex's 3 and 4, are as follows:

CLAIMANT'S EXHIBIT 3
(Duly Certified.)

United States Board of Tax Appeals
Docket No. 64926

CARLISLE PACKING COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Board's opinion, promulgated December 6, 1933, it is

ORDERED and DECIDED that there is a deficiency in income tax for the fiscal year ended November 30, 1929, in the amount of $1,473.88.

Enter:

(s) C. ROGERS ARUNDELL
Member.

[Endorsed]: Entered Jan. 4, 1934. [22]

United States Board of Tax Appeals
Washington

United States of America
District of Columbia—ss:

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, hereby certify the foregoing and attached to be true and correct copies of the DECISION in Docket Number 64926, wherein Carlisle Packing Company is Petitioner and the Commissioner of Internal Revenue is Respondent.

In testimony whereof I hereunto subscribe my name and affix the seal of said Board of Tax Appeals at the city of Washington in said District this 11th day of June, 1934.

[Seal] B. D. GAMBLE
Clerk,
United States Board of Tax Appeals.

United States Board of Tax Appeals
Washington

Docket No. 64926

CARLISLE PACKING COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

I, Eugene Black, chairman of the United States Board of Tax Appeals, the same being an independent agency in the executive branch of the Gov-

ernment, do hereby certify that B. D. Gamble is clerk of said Board and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Washington, D. C., this 11th day of June, 1934.

[Seal] EUGENE BLACK,
Chairman,
United States Board of Tax Appeals.

[23]

United States Board of Tax Appeals
Washington

Docket No. 64926

CARLISLE PACKING COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, do hereby certify that Eugene Black, whose name is subscribed to the foregoing certificate, was at the time of subscribing the same Chairman of the United States Board of Tax Appeals, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Board at Washington, D. C., this 11th day of June, 1934.

[Seal] B. D. GAMBLE,
Clerk,

United States Board of Tax Appeals. [24]

CLAIMANT'S EXHIBIT 4
(Duly certified.)

United States Board of Tax Appeals
Docket No. 55209

CARLISLE PACKING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the Board's opinion, promulgated December 6, 1933, it is

ORDERED and DECIDED that there are deficiencies in income taxes for the fiscal years ended November 30, 1927, and November 30, 1928, in the respective amounts of $12,429.82 and $1,435.49.

Enter:

(s) C. ROGERS ARUNDELL,
Member.

[Endorsed]: Entered Jan. 4, 1934. [25]

United States Board of Tax Appeals
Washington

United States of America,
District of Columbia.—ss.

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, hereby certify the foregoing and attached to be true and correct copies of the DECISION. In Docket Number 55209, wherein CARLISLE PACKING COMPANY, is Petitioner and the Commissioner of Internal Revenue is Respondent.

In testimony whereof I hereunto subscribe my name and affix the seal of said Board of Tax Appeals at the city of Washington in said District this 11th day of June, 1934.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

United States Board of Tax Appeals
Washington

Docket No. 55209

CARLISLE PACKING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

I, Eugene Black, chairman of the United States Board of Tax Appeals, the same being an inde-

pendent agency in the executive branch of the Government, do hereby certify that B. D. Gamble is clerk of said Board and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Washington, D. C., this 11th day of June, 1934.

[Seal] EUGENE BLACK,
Chairman,
United States Board of Tax Appeals. [26]

United States Board of Tax Appeals
Washington

Docket No. 55209

CARLISLE PACKING COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, do hereby certify that Eugene Black, whose name is subscribed to the foregoing certificate, was at the time of subscribing the same Chairman of the United States Board of Tax Appeals, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Board at Washington, D. C., this 11th day of June, 1934.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[27]

The assessment list, Claimant's Ex. 1, is as follows:

CLAIMANT'S EXHIBIT 1.
Admitted

UNITED STATES OF AMERICA
Treasury Department
Washington

June 11, 1934.

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed are true copies of Commissioner's Telegraphic Assessment List, January 1934 #1—Washington collection district—showing an assessment of $12,429.82 and interest in the amount of $4,407.65 for the fiscal year ended November 30, 1927; an assessment of $1,435.49 and interest in the amount of $422.90 for the fiscal year ended November 30, 1928; and an assessment of $1,473.88 and interest in the amount of $345.78 for the fiscal year ended November 30,

1929 against Carlisle Packing Company, Beach, Washington on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal] F. A. BIRGFELD,
Chief Clerk, Treasury Department.

COMMISSIONER'S TELEGRAPHIC
ASSESSMENT LIST
TELEGRAM

Official Business—Government Rates
Treasury Department
Bureau of Internal Revenue
Washington

11 AM (Time Written)
IT-C-P (Unit, Division and Section)
Charge: Treasury Department,
Appropriation for "Collecting Internal Revenue."

January Special #1
January 12 1934

Collector of Internal Revenue
Tacoma Washington

Summary assessment is made and certified to you as follows Carlisle Packing Company Beach Washington fiscal year ended eleven thirty nineteen twenty-seven income tax twelve thousand four hundred

twenty-nine dollars eighty-two cents six percent interest four thousand four hundred seven dollars sixty-five cents fiscal year ended eleven thirty nineteen twenty-eight income tax one thousand four hundred thirty-five dollars forty-nine cents six percent interest four hundred twenty-two dollars ninety cents fiscal year ended eleven thirty nineteen twenty-nine income tax one thousand four hundred seventy-three dollars eighty-eight cents six percent interest three hundred forty-five dollars seventy-eight cents total twenty thousand five hundred fifteen dollars fifty-two cents

Issue notice and make demand for immediate payment and if payment is not made immediately file notice of lien [17]

Thereupon the decision, orders, and assessment were made a part of the record.

Mr. WINTER: Now, if the Court please, the Government objects to the introduction of any testimony as to the merits of the tax liability on the following grounds:

1. The decision and orders of the United States Board of Tax Appeals in the same matters having become final, and from which no appeal can be taken, are res adjudicata on the Bankruptcy Court.

2. The jurisdiction of the United States Board of Tax Appeals and the Bankruptcy Court being concurrent, and no new issues being raised, the decision and orders of the United States Board of

Tax Appeals are binding on the Bankruptcy Court.

SPECIAL REFEREE: I shall overrule the objections, but reserve final ruling on the same until after the evidence has been submitted and I have had further opportunity to review the authorities submitted. You may, therefore, proceed.

Whereupon

G. L. WAKEMAN

was called to testify on behalf of the Trustee, and being first duly sworn testified as follows: [8]

My name is G. L. Wakeman and I reside at Seattle, Washington. I am in the banking business, connected with the Bank of California, Seattle branch. I became sole manager of that branch along in 1928. The Bank of California had an account, or carried an account of the Carlisle Packing Company which came to the bank, I think, in February 1920, and as I recall, they borrowed the first year, as every canning factory has to be financed. There were borrowings by the Carlisle Packing Company from the Bank of California in 1920 to and including 1926 as they were financed each year for their packing plants in Alaska as well as the operations on the Sound. The plants financed in Alaska were, one at Cordova, one in the Cooper River District, and one at Lummi Island on Puget Sound and later on the Cooper River one was transferred to Bristol Bay. As of January 1, 1927, which would

(Testimony of G. L. Wakeman.)

be at the end of 1926, their total indebtedness to the Bank was in excess of a million dollars. There were no borrowings during the year 1927. As I recall, the 1926 financing was done in the hope that the company might be able to work itself out of a bad situation they had gotten into and for that year we financed the operation in Cordova and Bristol Bay and on the Sound. The results were not satisfactory and it became apparent before the end of 1926 that they were not going to be in any better position, and it looked so hopeless to us that we began to negotiate with Mr. Wright, President of the Carlisle Packing Co., for the payment of his loan, inasmuch as we could not finance him any further. We made demands for payment of these loans, as we were not able to finance them any longer, something would have to be done to pay the obligation. These demands for payments of this loan, or these borrowings, were [9] complied with by the Carlisle Packing Company in 1927. The negotiations, I think, began the latter part of 1926 and we were in hopes that the Carlisle Packing Company would be able to dispose of the balance themselves, but it dragged along and became evident to us that some action would have to be taken to get control of the property so that we might be able to dispose of them for whatever we could, which negotiations ended in an agreement with Mr. Wright to transfer the property to us on a basis of $650,000.00 with the understanding that we would cancel

(Testimony of G. L. Wakeman.)

a like amount of the indebtedness to us. I can not recall that we threatened foreclosure, but in our negotiations we had in mind that it would be infinitely more satisfactory if we could make a transfer without legal proceedings, provided we could agree upon a price. The contract is dated February 15, 1927.

Whereupon the following contract was introduced in evidence: Trustee's Ex. C.

TRUSTEE'S EXHIBIT C

(Admitted)

THIS AGREEMENT, executed this 15th day of February, 1927, between CARLISLE PACKING COMPANY, a corporation, and FRANK WRIGHT, parties of the first part, hereinafter called the "sellers," and THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking corporation, party of the second part, hereinafter called the "buyer,"

WITNESSETH:

I.

For and in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration, receipt whereof is hereby acknowledged, the sellers do by these presents grant, bargain, sell, set over and assign unto the buyer all of their right, title and interest in and to the following described real, personal and mixed property, to wit:

(Testimony of G. L. Wakeman.)

(a) That certain salmon cannery, including all cannery buildings, warehouses, bunk houses, wharves, docks and other structures, together with all machinery, equipment, supplies and appliances used or intended to be used in connection therewith, known as the Cordova Cannery of the Carlisle Packing Company and located on and adjacent to the following described real property in the Territory of Alaska, to wit:

> Commencing at Corner No. 4 of U. S. Survey No. 902 of the Bear Lode Mineral Claim, running thence South 57° 19′ West a distance of 12 feet; thence North 51° 45′ West a distance of 20 feet; thence South 51° 45′ West a distance of 62 feet; thence South 26° East a distance of 285 feet; thence North 64° East a distance of 400 feet; thence North 26° West a distance of 266 feet more or less to a point on the Northwesterly line of said Bear Lode Mineral Claim; thence South 66° 01′ West a distance of 332 feet more or less to the place of beginning.

And also located in part upon and abutting and adjacent to the following described tide lands near Cordova, Alaska, to wit: [30]

> Commencing at a point on the shore between two prominent projecting rock points about 525 feet distant from the southwesterly corner of the above mentioned and described Bear Lode Mining Claim, which point is on the northwesterly line of said Bear Lode Mining Claim;

(Testimony of G. L. Wakeman.)

thence from said point of beginning by a line drawn at right angles with the shore line at said point and extending to the easterly line of the Copper River & Northwestern Railway Company's tract heretofore conveyed to said Copper River & Northwestern Railway Company, a corporation, by John Dalton, of Cordova, Alaska; thence following said easterly line of said Railway tract in a northeasterly direction a distance of 200 feet; thence by a line drawn parallel with the line first above described and produced to the shore line; thence following the meanderings of said shore line to the point of beginning.

(b) All of the supplies and inventory of stock on hand, consisting of raw materials, fuel, supplies, gear, piling, equipment and stores of every nature whatsoever now located at or about said cannery or wherever situate and used or intended to be used in and about said cannery and/or the fishing operations customarily had in connection with said cannery and/or any of the vessels and floating equipment, traps, trap sites and other fishing operations heretofore conducted by the said Carlisle Packing Company in the Territory of Alaska, including all property of a like or similar nature to that above in this item described and used or intended to be used in the Bristol Bay Cannery of the Carlisle Packing Company hereinafter described.

(Testimony of G. L. Wakeman.)

(c) That certain real property located in the Town of Cordova, Territory of Alaska, to wit:

Commencing at Corner No. 4 of U. S. Survey No. 902 of the Bear Lode Mineral Claim; running thence South 57° 19′ West a distance of 12 feet along the Northwesterly line of said Bear Lode Mineral Claim; thence North 51° 45′ West a distance of 245 feet more or less to the Easterly line of the right of way of the Copper River & Northwestern Railway; thence North 37° 53′ East along said Easterly line of said Railway right of way a distance of 286 feet; thence South 51° 45′ East a distance of 405 feet more or less to intersection of the Westerly line of said Bear Lode Mineral Claim at a point on said line between Corner No. 3 and Corner No. 4 of said Survey No. 902; thence South 66° 01′ West and along [31] said Westerly line of said Bear Lode Mineral Claim to the point of beginning.

Together with all of the tenements, hereditaments and appurtenances thereunto belonging and all fixtures and/or personal property thereon situate, and together with all of the rights of the Carlisle Packing Company in, to and under that certain quit claim deed dated and acknowledged the 8th day of August, 1919, between the Copper River & Northwestern Railway Company, a corporation, as party

(Testimony of G. L. Wakeman.)

of the first part and said Carlisle Packing Company, a corporation, as party of the second part.

(d) That certain permit issued by the United States Engineer Office of the United States War Department dated March 7, 1916, and numbered S.100/221, permitting the Carlisle Packing Company to construct and maintain a wharf in Orca Inlet, Territory of Alaska, at a point on the easterly shore of said inlet, north of Cordova, Alaska, immediately north of the existing Copper River & Northwestern Railway Company's wharf, along the waterfront of land designated as "Patented Mineral Claims of John Dalton," and more particularly shown upon and described in three certain maps or blueprints attached to said permit, which are hereby referred to and made a part hereof in the same manner as though herein set out in full, together with all of the rights, privileges and immunities of said Carlisle Packing Company under or by virtue of said permit, and together with all wharves and other structures of every nature constructed or placed upon the real property shown upon and described in said permit and blueprints, including all fixtures and/or personal property of every nature located upon or about said real property and/or said wharf or wharves and other structures. [32]

(e) That certain location certificate of manufacturing site executed by Carlisle Packing Company and dated and acknowledged the 13th day of March,

(Testimony of G. L. Wakeman.)

1916, and recorded in Book 2 of General Records of the District Recorder at Cordova, Alaska, at page 297, together with all rights and privileges of said Carlisle Packing Company under and by virtue of said location certificate, and together with all of the right, title and interest of the said Carlisle Packing Company in and to the real property therein described, to wit:

> A certain tract of land located approximately in Latitude 60° 40′ and Longitude 144° 44′ in the Territory of Alaska, Third Judicial Division, Cordova Recording Precinct, said tract of land being about 17.2 acres in area, and more particularly described as follows, to wit:
>
> Commencing at Corner No. 1, at a cottonwood post on the west line of the right of way of the Copper River & Northwestern R. R., from which the south end of Mile 49A bridge bears northeasterly about 200 feet; thence running northerly 1500 feet to Corner No. 2; thence running westerly 500 feet to Corner No. 3; thence running southerly 1500 feet to Corner No. 4; thence running easterly 500 feet to Corner No. 1, the place of beginning. As an additional description, said tract of land is located near Mile 50 of said railroad.

(f) That certain location certificate of manufacturing site executed by Carlisle Packing Company and dated and acknowledged the 13th day of March,

(Testimony of G. L. Wakeman.)

1916, and recorded in Book 2 of General Records of the District Recorder at Cordova, Alaska, at page 298, together with all rights and privileges of said Carlisle Packing Company under and by virtue of said location certificate, and together with all of the right, title and interest of the said Carlisle Packing Company in and to the real property therein described, to wit:

> A certain tract of land located approximately in Latitude 60° 40′ and Longitude 144° 44′ in the Territory of Alaska, Third Judicial Division, Cordova Recording Precinct, said tract of land being approximately 6.9 acres in area, and more particularly described as follows: [33]
>
> Commencing at Corner No. 1, where a ten inch post was placed on the shore of the Miles Glacier Lake, from which the North end of Miles Glacier bridge bears northwesterly about one-half mile; thence running northeasterly 1000 feet to Corner No. 2; thence running northwesterly 300 feet to Corner No. 3; thence running southwesterly 1000 feet to Corner No. 4; thence running 300 feet southeasterly to Corner No. 1, the place of beginning. As an additional description said parcel of land is located between Miles 47 & 48 of Copper River & Northwestern R. R.

(g) That certain water location certificate executed and acknowledged by the Carlisle Packing Company under date of March 22, 1916, and re-

(Testimony of G. L. Wakeman.)

corded in Book 2 of the General Records of the District Recorder at Cordova, Alaska, at page 301, together with all of the rights, privileges and immunities of the said Carlisle Packing Company under and by virtue of said water location certificate, and all of the rights of the said Carlisle Packing Company in and to the water right described in said certificate.

(h) The following described floating equipment now located at or heretofore used at or in connection with said Cordova Cannery and/or the fishing operations in connection with said cannery or intended to be used thereat or in such connection, to wit:

Boat	Carlisle Packing Company's Number	U. S. Customs House Number
Gasboat	1	U-517
"	2	U-509
"	3	U-511
"	4	U-514
"	5	U-503
"	6	U-504
"	7	U-520
"	8	U-505
"	9	U-523
"	10	U-526
"	11	U-506
"	12	U-528
"	13	U-529
"	14	U-507
"	15	U-508
"	16	U-530

(Testimony of G. L. Wakeman.)

Boat	Carlisle Packing Company's Number	U. S. Customs House Number
Gasboat	17	U-582
"	18	U-543
"	19	U-537
"	20	U-533
"	21	U-510
"	22	U-346
Skiff with Deck and Cabin	23	U-345
New Skiff	24	
" "	25	
" "	26	
" "	27	
" "	28	
" "	29	
" "	30	
" "	31	
" "	32	
" "	33	
Gasboat	40	U-539
"CHENEGA"		T-214

Boat	Register Number	Tons
"CARLISLE I"	PR399	42
"CORDOVA"	PR270	24
"CHINOOK"		12
"ELMO"		12
"DIXIE QUEEN"	PR132	30
"VALVADERE"	PL47	

1 Wanagan

3 Pot Scows

(Testimony of G. L. Wakeman.)

Boat	Register Number	Tons
1 Scow 20 x 50		
6 Seine Skiffs		
20 Gill Net Skiffs		
3 Punts		
1 Land Pile Driver		
3 Star Scows 16 x 50		
1 Scow 12 x 30		
2 Scows 23 x 55		
1 Columbia River Boat		
1 Deck Scow 10 x 30		
1 Scow 16 x 50		
2 Dories 18 feet long		
1 Pile Driver No. 1		
1 Life Boat		

Together with all equipment, supplies, fuel, spare parts, stores, gear, engines and other personal property used or intended to be used upon or in connection with the said floating property. [35]

(i) That certain contract numbered 615 between American Can Company, a New Jersey corporation, party of the first part, and Carlisle Packing Company, party of the second part, dated February 2, 1924, and referring to the furnishing of sanitary cans and can ends, together with all of the rights and privileges of the said Carlisle Packing Company under and by virtue of said contract; provided, however, that nothing herein contained shall be construed as an assumption of said contract by

(Testimony of G. L. Wakeman.)

the buyer, nor as in any manner obligating the buyer to perform any of the terms of said contract, unless and until it shall expressly assume and agree to perform the same by written instrument delivered to said American Can Company.

(j) The following described leases executed by American Can Company, a New Jersey corporation, as lessor, and Carlisle Packing Company, a corporation, as lessee, covering the use of certain machinery and equipment more particularly described in said leases, which are hereby referred to and made a part hereof in the same manner as though herein set out in full, to wit:

Lease No. 2739 dated March 29, 1924
Lease No. 2669 dated February 2, 1924
Lease No. 2670 dated February 2, 1924
Lease No. 2671 dated February 2, 1924
Lease No. 2711 dated May 5, 1924
Lease No. 2672 dated February 2, 1924
Lease No. 2683 dated February 2, 1924
Lease No. 2684 dated February 2, 1924

Together with all of the rights, privileges and immunities of the sellers under and by virtue of said leases, and together with all right, title and interest of the sellers in and to the machinery and personal property described in said leases. Provided, however, that nothing herein contained shall be deemed an assumption by the buyer of said leases, nor to impose upon the buyer any of the duties, liabilities or obligations of the Carlisle Packing Company un-

(Testimony of G. L. Wakeman.)

der or pursuant to said leases, unless and until the buyer [36] shall have assumed the same by a written instrument delivered to the American Can Company. It is expressly understood and agreed that the sellers will obtain and deliver to the buyer the written consent of said American Can Company to the assignment of said leases upon demand of the buyer.

(k) That certain contract dated the ..... day of October, 1926, between Carlisle Packing Company as party of the first part and William King as party of the second part, and referring to the furnishing of piling during the year 1927. Provided, however, that nothing herein contained shall be construed as an assumption of said contract by the buyer, nor as in any manner obligating the buyer to perform any of the terms, conditions and obligations of the said contract, unless and until the buyer shall assume the same by written instrument delivered to the said William King or to Carlisle Packing Company.

(l) That certain contract dated the 10th day of August, 1926, between Carlisle Packing Company as party of the first part and Chris Nielsen, of Goose Island, Prince William Sound, Territory of Alaska, as party of the second part, referring to the maintenance of lights upon certain fish traps in and about Prince William Sound, and the buyer hereby assumes and agrees to pay to the said Chris Nielsen all sums which may become due according

(Testimony of G. L. Wakeman.)

to the terms of said contract after the 15th day of February, 1927. Nothing herein contained shall be construed as obligating the buyer to pay any sums which now may be due under said contract or which may become due prior to the 16th day of February, 1927.

(m) All of the fish traps, trap locations, fishing rights, territorial licenses, War Department permits and rights to install fishing traps wheresoever situate in the waters of [37] the Territory of Alaska and in particular the following described fish traps located in and around Prince William Sound, Territory of Alaska, to wit:

	Territorial License No.
Trap No. 1 at Johnstone Point	26-024
Trap No. 2 at Gravina Point	26-025
Trap No. 3 at St. Mathews Bay	26-026
Trap No. 4 at Hawkins Cutoff	26-027
Trap No. 5 at Middle Ground Shoals	26-635

Together with the corresponding War Department permits for each of said traps, all of which are more particularly described in said territorial licenses and the applications therefor and in said War Department permits, to all of which reference is hereby made and which are hereby incorporated herein and made a part hereof in the same manner as though herein set out in full.

(Testimony of G. L. Wakeman.)

(n) That certain special use permit for the erection of Marine Ways on a small island in Orca Inlet opposite the Town of Cordova, Territory of Alaska, together with all rights and privileges of the sellers under and by virtue of said permit and together with all Marine Ways, buildings, wharves and other structures and all fixtures and personal property located upon the real property described in said permit.

(o) That certain salmon cannery, including all cannery buildings, warehouses, bunk houses, wharves, docks and other structures, together with all machinery, equipment, supplies and appliances at or used in connection with said cannery or intended for use in connection therewith, known as the Bristol Bay Cannery of the Carlisle Packing Company and located upon and adjacent to and abutting upon the following described real property in the Territory of Alaska, to wit:

> Beginning at Corner No. 1 identical with Corner No. 3 of United States Survey No. 914, the same being a meander corner, situated on the west shore of Kvichak River, Alaska, thence in a general northeasterly direction along the line of mean high tide on the west shore of Kvichak River one thousand (1000) feet to Corner No. 2, [38] thence west approximately seven hundred and seventy (770) feet to Corner No. 3, thence south approximately eight hundred and eighty (880) feet to Corner No. 4 in line 4—3 of United States Survey No. 914,

(Testimony of G. L. Wakeman.)

thence east along said line 4—3 approximately three hundred (300) feet to Corner No. 1, the place of beginning, containing ten (10) acres more or less.

And also located in part upon, adjacent to and abutting upon the following described real property situate on the shore of Nushagak Bay in the Territory of Alaska, for which application has been made for Soldiers' Additional Homestead Entry, Serial 00612, at the United States Land Office at Anchorage, Alaska, to wit:

Beginning at Corner No. 1, a meander corner on the east shore of Nushagak Bay, Territory of Alaska, identical with Corner No. 2 M. C. U. S. Amended Survey No. 769; thence east 10.48 chains along line 2—1 of U. S. Amended Survey No. 769 to Corner No. 2 identical with Corner No. 1 of said Survey No. 769; thence south 6.50 chains to Corner No. 3; thence west 4.85 chains to Corner No. 4, a meander corner on the east shore of Nushagak Bay; thence by meanders along the east shore of Nushagak Bay northwesterly approximately 8.50 chains to Corner No. 1 M. C. the place of beginning, containing approximately five (5) acres.

Latitude approx. 58° 48′ 00″ N.
Longitude approx. 158° 31′ 30″ W.

(p) That certain real property situate in the Territory of Alaska and heretofore purchased from

(Testimony of G. L. Wakeman.)

the United States through the United States Land Office at Anchorage, in the Territory of Alaska, under Soldiers' Additional Homestead Entry, Serial 07000, and more particularly described as follows, to wit:

> Beginning at Corner No. 1 identical with Corner No. 3 of United States Survey No. 914, the same being a meander corner, situated on the west shore of Kvichak River, Alaska, thence in a general northeasterly direction along the line of mean high tide on the west shore of Kvichak River one thousand (1000) feet to Corner No. 2, thence west approximately seven hundred and seventy (770) feet to Corner No. 3, thence south approximately eight hundred and eighty (880) feet to Corner No. 4 in line 4—3 of United States Survey No. 914, thence east along said line 4—3 approximately three hundred (300) feet to Corner No. 1 the place of beginning, containing ten (10) acres more or less.

Together with all of the tenements, hereditaments and appurtenances thereunto belonging, and together with all buildings, structures, [39] fixtures and personal property thereon situate. It is the intention of the sellers to convey to the buyer all rights acquired or to be acquired under said Soldiers' Additional Homestead Entry, and all right, title and interest in and to all real property acquired or to be acquired under said entry, and in

(Testimony of G. L. Wakeman.)

case of any discrepancy between the description hereinbefore set forth and the actual and correct description of said described real property as shown by the survey made in connection with said entry, the description shown in said survey shall govern. The sellers also assign and set over unto the buyer that certain guarantee dated March 22, 1924, from the W. E. Moses Land Scrip and Realty Company to Carlisle Packing Company, and all rights of the said Carlisle Packing Company under or by virtue of said guarantee.

(q) The following described floating equipment now located at or heretofore used at or in connection with said Bristol Bay Cannery and/or the fishing operations in connection with said cannery or intended to be used thereat or in such connection, to wit:

Barge "ONTARIO" 167.4′ x 37.2′ x 9.8′, 889 Tons net, Official No. 53314

Barge "HURON" 167.4′ x 37.2′ x 9.8′, 899 Tons net, Official No. 42857

14 Red Skiffs

Cannery Tender "CARLISLE" Official No. 214,998

1 25′ x 5′6 Speed Boat equipped with Whiton Auto Engine

4 Columbia River Boats

8 Skiffs

14 Skiffs

Scow "ISABELLE" 90 x 20 x 5′

(Testimony of G. L. Wakeman.)

1 Star Scow 16 x 55'
2 Power Boats equipped with 5 HP Engines
Cannery Tender "ECLIPSE" Official No. 208,424
14 Columbia River Sail Gill Net Boats 27'6" x 9'1" x 3'
1 Scow #1 22 x 66 x 6'
1 Scow #2 22 x 66 x 6'
1 Scow #3 20 x 60 x 5'
1 Sail Gill Net Boat 28'6" x 9'6 x 3'
14 Columbia River Fish Boats 29' x 8'10" x 2'10"
1 Scow No. 4 22 x 66 x 6'
1 Set Marine Ways
8 Fish Boats 29' x 8'10" x 2'10"
1 Deck Scow #15 16' x 50
Cannery Tender "TRITON" Official No. 203,903 [40]

Together with all equipment, supplies, fuel, spare parts, stores, gear, engines and other personal property used or intended to be used upon or in connection with the said floating property.

II.

The sellers hereby warrant and represent that all of the property hereinabove described or referred to and/or hereinafter described or referred to is free and clear of all liens and encumbrances of every nature whatsoever created or permitted by any act or omission of the sellers, or either of them, save

(Testimony of G. L. Wakeman.)

and except lines for taxes, and that they have good right to sell and convey the same. The said sellers, and each of them, further represent and warrant that no portion of said property has been in any manner sold, conveyed, alienated or in any manner mortgaged, pledged or hypothecated by the said sellers, or either of them, or any party or person whomsoever claiming by, through or under them, and that no personal property of any nature whatsoever has been removed from any of the canneries, premises, floating equipment or other property hereinabove or hereinafter described since the close of the fishing season of 1926, and that the plant, machinery, equipment, supplies and inventory on hand at said canneries and upon said premises, property and floating equipment is substantially the same and in substantially the same condition, reasonable wear and tear and damage by the elements excepted, as at the close of the fishing season of 1926. [41]

III.

It is understood and agreed that certain machinery, consisting principally of an iron chink and double seamers, is now at the plant of the Seattle Astoria Iron Works in the City of Seattle for repairs. All such machinery and equipment is intended to be covered by this agreement, and the same is hereby conveyed, transferred and sold to the buyer, subject to lien and charges for repairs.

(Testimony of G. L. Wakeman.)

IV.

There is now pending an application by Carlisle Packing Company to purchase from the United States under Soldiers' Additional Homestead Entry, Serial 06607, in the United States Land Office at Anchorage, Alaska, the following described real property situated on Nushagak Bay, Territory of Alaska, to-wit:

Beginning at Corner No. 1, a meander corner on the east shore of Nushagak Bay, Territory of Alaska, identical with Corner No. 2 M. C. U. S. Amended Survey No. 769; thence east 10.48 chains along line 2—1 of the U. S. Amended Survey No. 769 to Corner No. 2 identical with Corner No. 1 of said Survey No. 769; thence south 6.50 chains to Corner No. 3; thence west 4.85 chains to Corner No. 4, a meander corner on the east shore of Nushagak Bay; thence by meanders along the east shore of Nushagak Bay northwesterly approximately 8.50 chains to Corner No. 1 M. C. the place of beginning, containing approximately five (5) acres.

Latitude approx. 58° 48′ 00″ N.
Longitude approx. 158° 31′ 30″ W.

The sellers hereby assign, set over and convey to the buyer the said application and all of their rights under and pursuant thereto, together with all of their right, title and interest in and to the real property last above described, and agree that said

(Testimony of G. L. Wakeman.)

application may be prosecuted and completed and patent issued and all acts in connection with the final conclusion of said application be done and taken either in the name of the sellers, or either of them, or in the name of the buyer, as the buyer may elect. The sellers also assign, set over and convey to the buyer all of their right, title and interest in and to [42] the Soldiers' Additional Homestead Scrip heretofore filed in said Land Office in connection with said application, being the scrip of John Case and Stephen D. McBee.

V.

The sellers hereby set over, transfer and assign unto the buyer that certain agreement and lease dated the 24th day of April, 1916, and acknowledged the 28th day of April, 1916, between Copper River & Northwestern Railway Company, a corporation, as party of the first part, and Carlisle Packing Company, as party of the second part, together with all of the rights, privileges and immunities of the party of the second part under or by virtue of said agreement and lease, and together with all of the right, title and interest of the sellers in and to the real property therein described, being a strip of land 12 feet in width running from the southeasterly side of the northeasterly end of the wharf owned by the Copper River & Northwestern Railway Company at Cordova, Alaska, and running northeasterly a distance of 120 feet, and

(Testimony of G. L. Wakeman.)

thence southeasterly through the southeasterly boundary of the property, right of way, shore lands and premises of the said Copper River & Northwestern Railway Company and to the premises, property and plant of the Carlisle Packing Company, all as more fully shown upon the blueprint attached to said agreement and lease, which is hereby referred to and made a part hereof, and together with all of the buildings, structures, roadways, fixtures and personal property located upon said described premises. Nothing herein contained shall be construed as an assumption upon the part of the buyer of said lease and agreement, nor as in any manner obligating the buyer to perform any of the terms and conditions thereof, unless and until the buyer shall have assumed the same by written instrument delivered to said Copper River & Northwestern Railway Company. [43]

VI.

The sellers hereby assign, transfer and set over unto the buyer that certain lease dated and acknowledged the 6th day of January, 1916, between John Dalton, of Cordova, Alaska, party of the first part, and Frank Wright, of Seattle, Washington, party of the second part, covering the following described real property located on tide lands near Cordova, Alaska, more particularly described as follows, to-wit:

Commencing at a point on the shore between two prominent projecting rocks about 525 feet

(Testimony of G. L. Wakeman.)

distant from the southwesterly corner of the Bear Lode Mining Claim, as shown upon U. S. Survey No. 902, which point is on the northwesterly line of said Bear Lode Mining Claim; thence from said point of beginning by a line drawn at right angles with the shore line at said point and extending to the easterly line of the Copper River & Northwestern Railway Company's tract, heretofore conveyed to said Copper River & Northwestern Railway Company by the said John Dalton; thence following said easterly line of said Railway tract in a northeasterly direction a distance of 200 feet; thence by a line drawn parallel with the line first above described and produced to the shore line; thence following the meanderings of the shore line to the point of beginning.

Together with all of the right, title and interest of the sellers in and to said described real property, and together with all of the buildings, structures, fixtures and personal property located upon said described real property. Provided, however, that nothing herein contained shall be construed as an assumption upon the part of the buyer of said lease, nor as in any manner obligating the buyer to perform any of the terms and conditions thereof, unless and until the buyer shall have assumed the same by written instrument delivered to said John Dalton.

(Testimony of G. L. Wakeman.)

VII.

It is understood and agreed that said Carlisle Packing Company is the lessee under a certain lease from Copper River & [44] Northwestern Railway Company dated the 2nd day of February, 1924, and acknowledged by the said Copper River & Northwestern Railway Company on the 14th day of February, 1924, covering the following described real property situate in the Territory of Alaska, to-wit:

> Commencing at Corner No. 4 of U. S. Survey No. 902 of the Bear Lode Mineral Claim, running thence South 57° 19′ West a distance of 12 feet; thence North 51° 45′ West a distance of 20 feet; thence South 51° 45′ West a distance of 62 feet; thence South 26° East a distance of 285 feet; thence North 64° East a distance of 400 feet; thence North 26° West a distance of 266 feet more or less to a point on the Northwesterly line of said Bear Lode Mineral Claim; thence South 66° 01′ West a distance of 332 feet more or less to the place of beginning.

Said lease provides that the lessee shall not have the right to assign the same nor to sublet any portion of the demised premises without the written consent of the lessor first had and obtained. The sellers expressly covenant and agree that they will obtain the written consent of the said Copper River & Northwestern Railway Company to an assignment of said

lease to the buyer or its nominee with all possible dispatch, and will forthwith upon the obtaining of such consent execute and deliver to the buyer or its nominee a proper and sufficient written assignment of said lease and a conveyance of all of their right, title and interest in and to said described real property and a conveyance of all of the buildings, structures, fixtures and personal property located upon said described premises. The buyer is, however, granted immediate possession of said premises, and shall have the right to enter upon said premises and operate the plant thereon situate during the fishing season of 1927 and so long thereafter as may be necessary or convenient for the conclusion of the operations carried on during said fishing season and for the removal of any and all fish packed or property brought [45] upon said premises by the buyer. None of the notes hereinafter referred to shall, however, be surrendered or cancelled, and none of the indebtedness hereinafter referred to shall be considered cancelled or paid, unless and until said written consent and said assignment (together with the other conveyances, assignments and other instruments hereinafter referred to) have been obtained and made.

VIII.

It is the intention of this agreement that the sellers shall sell and convey to the buyer and that the buyer shall receive all of the property of every nature whatsoever of the sellers now located in the Territory of Alaska and/or in the waters of the Ter-

(Testimony of G. L. Wakeman.)

ritory of Alaska, together with all of the property of every nature whatsoever and wheresoever situate heretofore used or intended to be used in connection with the fishing and packing operations of the sellers at either the said Cordova Cannery or the said Bristol Bay Cannery or the waters of Alaska adjacent thereto, and the sellers hereby covenant and agree to execute and deliver to the buyer or its nominee such other and further and additional assignments, bills of sale, deeds, conveyances and other instruments as the buyer may demand and as shall be reasonably necessary or proper for the effectual conveyance by the sellers to the buyer of all of the property hereinabove described and all of the property referred to in this paragraph. Such conveyance and other instruments shall be in such form as the buyer may reasonably require, and shall be furnished by the sellers with all reasonable dispatch upon demand of the buyer. The buyer is expressly given the right to assign and transfer to any other person, party or corporation whatsoever this agreement and all rights acquired thereunder and all of its right, title and interest in and to the various properties herein- [46] above described, and in case of such assignment the sellers agree that such additional conveyances and instruments shall be made direct to such assignee if the buyer shall so elect.

IX.

The sellers are now indebted to the buyer upon certain promissory notes, a portion of which are

(Testimony of G. L. Wakeman.)

specifically secured by the pledge of certain *cannot* salmon and a portion of which are not so specifically secured and are hereinafter referred to as unsecured notes. Upon the execution and delivery to the buyer by the sellers of the additional conveyances and instruments in the preceding paragraph mentioned and upon the delivery to the buyer of the consent in paragraph VII hereinabove mentioned, and upon compliance by the sellers with all of the other terms and conditions of this agreement, the buyer agrees to cancel and deliver to the sellers sufficient of the unsecured notes of the sellers now held by the buyer to aggregate with principal and interest the sum of Six Hundred Fifty Thousand Dollars ($650,000.00). In such event, however, interest shall be calculated for the purpose of fixing and arriving at said amount of Six Hundred Fifty Thousand Dollars ($650,000.00) only to the date of this agreement. The cancellation of said notes shall be considered and construed as absolute payment thereof and as absolute and full payment for all of the property hereinbefore described or referred to, and upon such cancellation the buyer shall be and become the absolute owner of all of said property in its own right and not as security or in trust by way of security for any of the remaining indebtedness of the sellers to the buyer. Such cancellation shall not, however, in any manner affect or alter the status of any of the said additional and remaining indebtedness of the sellers to the buyer, nor shall

(Testimony of G. L. Wakeman.)

this agreement in any manner affect or alter the status of any of the other property of the sellers, or either of them. [47]

X.

Nothing in this agreement contained shall be construed as conveying to the buyer any right, title or interest whatsoever in or to any trade marks, trade names, brands or labels heretofore used by the sellers or now on hand at either of said canneries or elsewhere, nor as conveying to the buyer any right, title or interest in or to any of the office furniture, fixtures and equipment now located at the Seattle, Washington, office of the Carlisle Packing Company, nor as conveying to the buyer any right, title or interest in or to a certain claim for refund of federal income tax for the year 1917 now pending in the Department of Internal Revenue.

XI.

The sellers further transfer, assign and set over unto the buyer all of the fire, marine, casualty, liability and other insurance policies now in force and covering any of the property hereinabove conveyed or covering operations of any of said property. The sellers agree to execute and deliver to the buyer separate and formal assignments of each of said policies in the form required by the various companies issuing the same as soon as possible, and to deliver the policies themselves to the buyer. At the time hereinabove provided for the cancellation of the indebtedness in the sum of Six Hundred Fifty

(Testimony of G. L. Wakeman.)

Thousand Dollars ($650,000.00) as set forth in paragraph IX of this agreement, the buyer agrees to pay to the Carlisle Packing Company, in addition to the cancellation of said indebtedness, a sum equal to the unearned premium upon said policies as of the date of this agreement calculated upon a pro rata basis.

XII.

This agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors and [48] assigns of all of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

CARLISLE PACKING COMPANY,
By FRANK WRIGHT,
President.

[Corporate Seal]
Attest:
C. H. EASTWOOD,
Secretary.

FRANK WRIGHT
THE BANK OF CALIFORNIA,
NATIONAL ASSOCIATION,
By G. L. WAKEMAN,
Joint Manager.

(Testimony of G. L. Wakeman.)

State of Washington,
County of King—ss.

On this 15th day of February, 1927, before me personally appeared FRANK WRIGHT and C. H. EASTWOOD, to me known to be the President and Secretary, respectively, of CARLISLE PACKING COMPANY, the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

DeWOLFE EMORY,
Notary Public in and for the State of Washington, residing at Seattle.
[Notarial Seal]

State of Washington,
County of King—ss.

THIS IS TO CERTIFY that on this 15th day of February, 1927, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came FRANK WRIGHT, to me known to be the individual described in and who executed the foregoing in-

(Testimony of G. L. Wakeman.)

strument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

DeWOLFE EMORY,

Notary Public in and for the State of Washington, residing at Seattle.

[Notarial Seal] [49]

(Witness continuing) I can not say that there was any definite decision as to what the Bank would do if the loans of the Carlisle Packing Company were not paid in 1927. As I recall, that did not enter into the question because we began to negotiate with the Carlisle Packing Company for the transfer of these properties. There wasn't any opposition on their part; it was just a question of the terms. So that we did not have to consider what we were going to do if they did not transfer them to us. I could not say positively just what assets the company had, but on our obligations we had the individual endorsement of Mr. Wright; consequently, anything [10] that he had was collateral to our loans as well as the canning property. It was my understanding that Mr. Frank Wright owned all of the stock of the Carlisle Packing Company, except perhaps a qualifying share.

(Testimony of G. L. Wakeman.)

Cross examination by Mr. Winter

Q. You spoke of the canning property as collateral for the loans being made by the Bank. Did the Bank hold any mortgages on Lummi Island property or Bristol Bay or Cordova?

A. They never had any mortgages on any of them.

Q. Do you know Mr. Hager?

A. Yes, he was the president of the New England Fish Company.

Q. In Seattle?

A. Yes, he came here, as I recall, along about the end of January. It seems to me he was here a couple of times along the first part of February, early part, I would say about the first of February. The negotiations got to a point where Mr. McIntosh, President of the Bank in San Francisco, thought he better come up, and he came up here and he personally dickered on this thing for quite a while. There was a long drawn out conference with Hager.

Q. Some time in January, 1927, on to the consummation?

A. Yes. We had telegrams showing in regard to the taking over of the cannery. McIntosh came up, as I recall, the latter part of January or the first of February to complete the deal on the taking over of canneries from the Carlisle.

Q. Were you also figuring with Everett people on the taking over of this property?

(Testimony of G. L. Wakeman.)

A. Yes. [11]

Q. Mr. Hager accepted the Cordova plant at $300,000.00, is that right?

Mr. OLSON: Trustee objects to introduction of evidence of the amount received for these properties on the ground that it is incompetent, irrelevant and immaterial.

A. Yes.

Q. Now, in regard to the sale of the other property, the Bristol Bay property, did you have telegrams concerning that sale?

A. Yes.

Q. Isn't it a fact that a telegram you received advised that the deal was closed for $350,000.00 as originally suggested?

A. Yes. We had a three-handed deal on that and we were trying to get the best offer we could out of it. While Mr. Hager was negotiating and dickering over the price of this purchase of Cordova down in San Francisco they succeeded in making arrangements for the sale of Bristol Bay for $350,000.00.

Q. Then subsequent to that time your Bank agreed with Mr. Wright to take over the two canneries at $650,000.00, which was consummated by the entering into this agreement dated February 15, 1927? Trustee's Ex. C.

A. Yes.

Q. Then upon the sale of this plant to your Bank you gave the Carlisle Packing Company a credit of $650,000.00, is that right?

Q. Yes. We made the best deal we could.

Whereupon

GEORGE V. WHITTLE

was called to testify on behalf of the Trustee and being first duly sworn, testified as follows: [12]

My name is George V. Whittle. I reside at Seattle. I am a certified public accountant and have audited the books of the Carlisle Packing Company for some time. The accounts of the Carlisle Packing Company were examined for a number of years by Price-Waterhouse and Company. Since 1922 I have made audit reports of the company. I prepared the profit and loss statements for the year 1926.

Mr. WINTER: No cross-examination.

Whereupon

FRANK WRIGHT, Sr.

was called as a witness on behalf of the Trustee, and being first duly sworn, testified as follows:

My name is Frank Wright, Sr., and I am in the salmon canneries business. I owned all but two qualifying shares of the Carlisle Packing Company since the incorporation of the company in 1906, and have been during all of that time president and manager. The company owned and operated plants at Cordova and Bristol Bay, and on the Sound. The Carlisle Packing Company began its borrowings from the Bank of California in 1920, who continued

(Testimony of Frank Wright, Sr.)

to finance it in its fishing operations for each of the years afterwards, up to and including 1926. The money was used in, bank interest, general expenses, income tax and operating expenses. In 1927 the Bank told me that they were not going fishing with me that year. That they were not going to finance me and they called the loans and demanded payment. They made no statement as to what they intended to do if I did not pay, as there was no question of that. They sent me to the bank's attorneys and I went. I owed the money and I realized that if the plants were not sold and sold quickly that they would be a loss to both of us. Of course it [13] costs money to shut down a plant and after it is shut down for one year it would not have the value that it would have if running continually. February 15, 1927 we entered into the agreement with the Bank of California, turning over to them the Cordova Plant, Bristol Bay Plant and all boats and net, canneries and properties incidental to the operation of those plants. I didn't have much to do with it. The Bank of California had my personal signature for all of the money that Carlisle Packing Company owed, as well as the signature of the Carlisle Packing Company. From 1920 until February 15, 1927 the Carlisle Packing Company was at no time free from indebtedness to the Bank.

(Testimony of Frank Wright, Sr.)

Cross-examination by Mr. Winter

Q. I show you a certified photostat copy of income tax return for the year 1927 and ask you whether or not you signed this return?

A. I did.

Q. And you swore to it under oath?

A. Yes.

Mr. WINTER: Now, if the Court please, we will offer in evidence Trustee's Exhibit B, certified photostat copy of the income tax return of Carlisle Packing Company for the fiscal year ended November 30, 1927.

Special REFEREE: It is admitted.

The income tax return of the Carlisle Packing Company for the fiscal year 1927, Trustee's Ex. B, is as follows:

TRUSTEE'S EXHIBIT B.

(Admitted)

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
Washington

June 11, 1934

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Corporation Income Tax Return for 1927, (with Certificate of Inventory (Form 1126) and schedules attached, filed by Carlisle Packing Com-

(Testimony of Frank Wright, Sr.)

pany, Beach, Washington on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal] F. A. BIRGFELD.

Chief Clerk, Treasury Department. [28]

Form 1120
U. S. Internal Revenue

(Auditor's Stamp)

CORPORATION INCOME TAX RETURN

For Fiscal ended Nov. 30, 1927

File This Return with the Collector of Internal Revenue for Your District on or Before March 15, 1928

Page 1 of Return

File Code .....

Serial Number .....

(Cashier's Stamp)

Print Plainly Corporation's Name and Business Address

Carlisle Packing Company
(Name)

.....
(Street and Number)

Beach, Washington
(Post Office and State)

Cash Check M. O.
Cert. of Ind.

First Payment

$.....

Date of Incorporation January 3, 1902

Under the Laws of what State or Country Washington

Carded

As .....

KIND OF BUSINESS Salmon Canning

IS THIS A CONSOLIDATED RETURN?.....

Item and Instruction No.	GROSS INCOME	
1.	Gross Sales from Trading or Manufacturing, Less Returns and Allowances	$779,538.16
2.	Less Cost of Goods Sold:	
	(a) Inventory at close of preceding year	$701,913.30

Item and Instruction No.	GROSS INCOME		
	(b) Merchandise bought for sale		
	(c) Cost of manufacturing or otherwise producing goods (From Schedule A)	234,099.06	
	(d) Total of lines (a), (b), and (c)	$936,012.36	
	(e) Less inventory at end of year	175,020.00	760,992.36
3.	Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)		$ 18,545.80
4.	Gross Profit from Operations Other Than Trading or Manufacturing. (State source of income):		
	(a)		
	(b)		
	(c)		
5.	Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds		
6.	Rents		
7	Royalties		
8.	Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (From Schedule B)		
9.	Dividends on Stock of Domestic Corporations		
10.	Other Income (including dividends received on stock of foreign corporations). (State nature of income):		
	(a) Sale of Junk at Yukon Cannery (considered all profit)		223.08
	(b)		
	(c)		
11.	TOTAL INCOME IN ITEMS 3 TO 10		$ 18,768.88

Item and Instruction No.	DEDUCTIONS		
12.	Compensation of Officers (From Schedule C)	$	
13.	Rent on Business Property	790.50	
14.	Repairs (From Schedule D)	9,879.03	
15.	Interest	35,145.65	
16.	Taxes (From Schedule E)	2,675.31	
17.	Losses by Fire, Storm, etc. (From Schedule F)		
18.	Bad Debts (From Schedule G)	11,049.66	
19.	Dividends (From Schedule H)		
20.	Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I)	15,931.45	
21.	Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit schedule, see Instruction 21)		
22.	Other Deductions Not Reported Above. (Explain below, or on separate sheet):		
	(a) Salaries and wages. (Not included in Item 2, 12, or 14 above)	3,432.50	
	(b) Net Loss for prior year. (Submit schedule)	159,446.36	
	(c) Allowable Deductions as per Schedule attached	14,878.67	
	(d)		
	(e)		
	(f)		
23.	TOTAL DEDUCTIONS IN ITEMS 12 TO 22		$253,249.13
24.	NET LOSS (Item 11 minus Item 23)		$234,480.25*

*Denotes Red Ink.

COMPUTATION OF TAX

Item and Instruction No.		
25.	Net Income (Item 24 above)	$
26.	Less Credit of $2,000 (for a domestic corporation having a net income of less than $25,270)	$
27.	Balance (Item 25 minus Item 26)	$
28.	Income Tax (13½% of Item 27) $	$
29.	If the Net Income of a Domestic Corporation is Less Than $25,270, Enter the Amount in Excess of $25,000	$
30.	Total Tax (Item 28 plus Item 29)	$
31.	Less: Income Tax Paid at Source. (This credit can only be allowed to a nonresident foreign corporation)	$
32.	Income and Profits Taxes Paid to a Foreign Country or to a Possession of the United States by a domestic corporation	$
33.	Balance of Tax (Item 30 minus Items 31 and 32)	$ No Tax

An amended return must be marked "Amended" at top of return Checks and drafts will be accepted only if payable at par

[Copies 3. Typed by R. D. Date 3/12 28. Compared F. S. to R. D. Footings Chkd. N. W. B.]

[29]

(Testimony of Frank Wright, Sr.)

Page 2 of Return

SCHEDULE A

COST OF MANUFACTURING OR PRODUCING GOODS (See Instruction 2)

See Separate Schedule.

SCHEDULE B

PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8)

[None]

SCHEDULE C

COMPENSATION OF OFFICERS

(See Instruction 12)

[None]

SCHEDULE D—COST OF REPAIRS

(See Instruction 14)

See Separate Schedule.

SCHEDULE E—TAXES PAID

(See Instruction 16)

[None]

SCHEDULE F

EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 17)

[None]

(Testimony of Frank Wright, Sr.)

SCHEDULE G—BAD DEBTS

(See Instruction 18)

See Separate Schedule.

SCHEDULE H—DIVIDENDS DEDUCTIBLE

(See Instruction 19)

[None]

SCHEDULE I

EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 20)

See Separate Schedule.

Attach a separate sheet if any of the above schedules do not provide sufficient space.

Page 3 of Return — SCHEDULE K—BALANCE SHEETS (See Instruction 43)

Items	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
ASSETS				
1. Cash		$ 2,617.98		$ 1,639.97
2. Notes receivable				
3. Accounts receivable	$		$	
Less reserve for bad debts		16,459.39		147,070.31
4. Inventories:				
Raw materials	$		$	
Work in process				
Finished goods	701,913.30		175,020.00	
Supplies	155,720.25		24,979.68	
		857,633.55		199,999.68
5. Investments:				
Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia	$		$	
Securities issued under the Federal Farm Loan Act, or under such Act as amended				
Obligations of the United States or its possessions				
6. Loans (describe fully):				
Lummi Island Land Co.	$164,217.85		$214,221.80	
Frank Wright	40,975.34			
		205,193.19		214,221.80

SCHEDULE K—BALANCE SHEET (See Instruction 43)

Items	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
7. Deferred charges:				
Prepaid insurance	$ 5,627.41		$ 161.08	
Prepaid interest	12,190.15			
		17,817.56		161.08
8. Capital assets:				
Land		11,717.30		
Buildings, Machinery and equipment	$404,390.89		$206,799.81	
Floating Equipment	281,670.68			
Oil Drums	5,006.80			
Trap Locations	250,000.00			250,000.00
	$941,068.37		$206,799.81	
Less reserves for depreciation and depletion	511,473.86	429,594.51	169,708.30	37,091.51
9. Patents				
10. Good will				
11. Other assets (describe fully):				
Stock—Salmon Export Corp.	$ 558.75		$ 558.75	
		558.75		558.75

SCHEDULE K—BALANCE SHEET (See Instruction 43)

Items	Beginning of Taxable Year		End of Taxable Year	
	Amount	Total	Amount	Total
12. TOTAL ASSETS		$1,541,592.23		$850,743.10
LIABILITIES				
13. Notes payable		$1,374,468.72		$386,391.93
14. Accounts payable		11,516.61		10,682.21
15. Accrued expenses (describe fully):				
Taxes	$		$ 1,550:53	
Interest			2,768.56	
		24,398.84		4,319.19
16. Other liabilities (describe fully):				
	$		$	
17. Capital stock:				
Preferred stock (less stock in treasury)	$		$	
Common stock (less stock in treasury)	80,000.00	80,000.00	80,000.00	80,000.00
18. Surplus	$ 51,208.06		$369,349.77	
19. Undivided profits		51,208.06		369,349.77
20. TOTAL LIABILITIES		$1,541,592.23		$850,743.10

(Testimony of Frank Wright, Sr.)
Page 4 of Return

SCHEDULE L

RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS

1.	Net income from Item 24, page 1 of the return	$ 75,033.89*
2.	Nontaxable income:	
	(a) Interest on obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia	
	(b) Interest on securities issued under the Federal Farm Loan Act, or under such Act as amended	
	(c) Interest on obligations of the United States or its possessions	
	(d) Dividends deductible under Section 234(a) 6 of the Revenue Act of 1926	
	(e) Proceeds of life insurance policies paid upon the death of the insured	
	(f) Other items of nontaxable income (to be detailed):	
	(1)	
	(2) Forgiveness of Debt	393,431.69
	(3)	
3.	Charges against reserve for bad debts, if Item 18, page 1 of return, is not an addition to a reserve	
4.	Charges against reserves for contingencies, etc. (to be detailed):	
	(a)	
	(b)	
	(c)	
5.	Total of Lines 1 to 4, inclusive	$318,397.80
6.	Total from Line 14	256.09

*Denotes Red Ink.

(Testimony of Frank Wright, Sr.)

7.	Net profit for year as shown by books, before any adjustments are made therein (Line 5 minues Line 6)	$318,141.71
8.	Surplus and undivided profits as shown by balance sheet at close of preceding taxable year	51,202.06
9.	Other credits to surplus (to be detailed)	
	(a)	
	(b)	
	(c)	
10.	Total of Lines 7 to 9, inclusive	$369,349.77
11.	Total from Line 17	
12.	Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)	
13.	Unallowable deductions:	
	(a) Donations, gratuities, and contributions	$ 256.09
	(b) Income and profits taxes paid to the United States, and so much of such taxes paid to its possessions or foreign countries as are claimed as a credit in Item 32, page 1 of the return	
	(c) Federal taxes paid on tax-free covenant bonds	
	(d) Special improvement taxes tending to increase the value of the property assessed	
	(e) Furniture and fixtures, additions, or betterments treated as expenses on the books	
	(f) Replacements and renewals	
	(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary	
	(h) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation	

(Testimony of Frank Wright, Sr.)

(i) Additions to reserve for bad debts which are not included in Item 18, page 1 of return .....

(j) Additions to reserves for contingencies, etc. (to be detailed):

(1) .....

(2) .....

(3) .....

(k) Other unallowable deductions (to be detailed):

(1) .....

(2) .....

(3) .....

14. Total of Line 13 ..... $ 256.09

15. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation, or other property):

(a) Date paid ..... Character ..... $.....

(b) Date paid ..... Character .....

(c) Date paid ..... Character .....

(d) Date paid ..... Character .....

16. Other debits to surplus (to be detalied):

(a) .....

(b) .....

(c) .....

17. Total of Lines 15 and 16 ..... $.....

QUESTIONS

KIND OF BUSINESS

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, ice harvesting, etc., and also the leasing of such property. State the product or prod-

(Testimony of Frank Wright, Sr.)

ucts. B.—Mining and quarrying, including gas and oil wells, and also the leasing of such property. State the product or products. C.—Manufacturing. State the product and also the material if not implied by the name of the product. D.—Construction—excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations. E1.—Transportation—rail, water, local, etc. State the kind and special product transported, if any. E2.—Public utilities—gas (natural, coal, or water); electric light or power (hydro or steam generated); heating (steam or hot water); telephone; waterworks or power. E3.—Storage—without trading or profit from sales—(elevators, warehouses, stockyards, etc.). State product stored. E4.—Leasing transportation or utilities. State kind of property. F.—Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, or commission, and product handled. Sales with storage with profit primarily from sales. G.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. State the service. H.—Finance, including banking, real estate, insurance. I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

2. Concerns whose business involves activity falling in two or more of the above general classes, where the *same product* is concerned, should report

(Testimony of Frank Wright, Sr.)

business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with classes A or B; concerns in C (manufacturing) which own or control their source of material supply in A or B and which also transport, sell, or install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own the source of supply of materials used exclusively or mainly in their constructive work; concerns in E1 or E2 may own or control the source of their material or power; concerns in F may transport or store their own merchandise, but its production would identify them with A, B, or C.

3. Answers:

(a) General class (use key letter designation) .....

(b) Main income-producing business (give specifically the information called for under each key letter, also whether acting as principal, or as agent on commission; state if inactive or in liquidation) Salmon Canning.

AFFILIATIONS WITH OTHER CORPORATIONS

See Instruction 38

4. Does the corporation own 95 per cent or more of the outstanding capital stock of another domestic corporation or of other corporations? No.

5. Is over 95 per cent or more of your outstanding capital stock owned by another corporation? No.

(Testimony of Frank Wright, Sr.)

6. Is 95 per cent or more of your outstanding capital stock as well as 95 per cent or more of the outstanding capital stock of another corporation or of other corporations owned or controlled by the same individual or partnership or by the same individuals, partnerships, or corporations in substantially the same proportion? Yes.

7. If the answer to questions 4, 5, and 6, or to any of them, is "yes," answer the following:

(a) Did the corporation file Forms 851, 852, 853, and 853A for the taxable year 1922 or subsequent taxable years? Yes. If the answer to this question is "yes," these forms will not be required; except under the circumstances described in question (b). If the answer to this question is "no," and the answer to questions 4, 5, and 6, or to any of them, is "yes," procure from the Collector of Internal Revenue for your district Forms 851, 852, 853, and 853A, Affiliations Schedules 1, 2, 3, and 4, which shall be filled in and filed as a part of this return. If the answer to this question is "no," question (b) need not be answered.

(b) Did substantially the same conditions, as are set out in the Affiliations Schedules filed for 1926 or prior years, obtain during the entire taxable year 1927? Yes. If the answer to this question is "no," a statement, setting forth the particulars in which the situation has changed, should be attached to and made a part of this return. If there have been substantial changes in stockholdings, a complete schedule of such changes should be submitted on Form 853, Affiliations Schedule 3. If there are companies

(Testimony of Frank Wright, Sr.)

other than those covered by the Affiliations Schedules for prior years which, applying the tests contained in questions 4, 5, or 6, may have come into the affiliated group since 1926, Forms 851, 852, 853, and 852A, are required for the entire group for the taxable year.

(c) Did the corporation file a consolidated return for the preceding taxable year? Yes.

PREDECESSOR BUSINESS

8. Did the corporation file a return under the same name for the year preceding taxable year? Yes. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? ..... If answer is "yes," give name and address of each predecessor business, and the date of the change in entity.

.....

.....

Upon such change were any asset values increased or decreased? ..... If the answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished.

BASIS OF RETURN

9. Is this return made on the basis of actual receipts and disbursements? No. If not, describe fully what other basis or method was used in computing net income. Accrual.

(Testimony of Frank Wright, Sr.)

LIST OF ATTACHED SCHEDULES

10. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the taxpayer should be placed on each separate schedule accompanying the return.

Allowable Deductions	Schedule	22 c
Bad Debts	"	G
Repairs	"	D
Cost of Goods Produced	"	A
Depreciation	"	I

[Attached to p. 2 of Return]

Form 1126

U. S. Internal Revenue

CERTIFICATE OF INVENTORY

(To be filed with Collector of Internal Revenue with Income Tax Return)

For Calendar Year 1927

Or for fiscal year begun....., 19....,
and ended....., 19.....

Name Carlisle Packing Company

Address Beach, Washington

Number of sheets submitted herewith.....

PRINCIPAL CERTIFICATE

I swear (or affirm) that the closing inventory of the taxpayer named above, amounting to $199,999.68, was taken under my direction, and that to the best of my knowledge and belief is true and complete in every respect; that the method of pricing

(Testimony of Frank Wright, Sr.)

the raw material, work in process, and finished goods was at * C or M; that I have carefully read all of the instructions on the reverse side of this form; that this inventory was taken in accordance therewith; and that the following-named persons whose separate certificates are subscribed hereon or attached hereto are the officers and employees under whose personal direction the various parts of this inventory were taken:

Name	Title or position	Part of inventory taken	Amount
Frank Wright	President	Canned Salmon	$175,020.00
		Supplies	$ 24,979.68
			$199,999.68
			$
			$
			$
			$

.....

(Signature)

.....

(Title)

Sworn to and subscribed before me this.....day of....., 19.....

.....

(Signature of officer administering oath) (Title)

*State "cost" or "cost or market, whichever is lower." If any other basis was used, describe fully, state why used and date on which inventory was last reconciled with stock.

(Testimony of Frank Wright, Sr.)

SUBSIDIARY CERTIFICATE

I (or we), the undersigned employees of the taxpayer named above, swear (or affirm) that I (or we) personally directed and observed the taking of the parts of the inventory set opposite my (or our) names, and, to the best of my (or our) knowledge and belief, is true and complete in every respect; that I (or we) have carefully read the instructions on the reverse side of this form and that the parts of the inventory for which I am (or we are) responsible was taken in accordance therewith.

Signature	Title or position	Part of inventory taken

Sworn to and subscribed before me this..... day of....., 19.....

.....

(Signature of officer administring oath) (Title)

[Copies 3. Typed by R. D. Date 3/12/28. Footings Chkd. N. W. B.]

[Printer's Note—Reverse not set forth herein.]

(Testimony of Frank Wright, Sr.)

Schedule 22C

CARLISLE PACKING COMPANY

Allowable Deductions

Auditing	2,928.35	
Telephone & Telegraph	358.68	
Stationery & Printing	65.00	
Advertising	4,985.12	
Dues & Subscriptions	107.50	
Legal	3,340.95	
Traveling	2,717.38	
Corporation Licenses	160.00	
Filing Fees	10.75	
Miscellaneous	204.94	
		14,878.67

Schedule G

Bad Debts

Jones & Williams	10,337.39	
Ed. Kavafian	50.00	
John Klaboe	255.00	
Bristol Bay Natives	139.35	
Cordova " "	267.92	
		11,049.66

(Testimony of Frank Wright, Sr.)

Schedule D

Repairs

Cordova Cannery		
Labor	2,421.51	
Insurance	3,117.26	
Supplies & Repairs	2,862.96	
Miscellaneous	97.92	
		8,499.65
Bristol Bay Cannery		
Labor	130.00	
Insurance	1,249.38	1,379.38
		9,879.03

[Copies 3. Typed by N. W. B. Date 3/12/28. Compared F. S. to R. D. Footings Chkd. N. W. B.]

(Testimony of Frank Wright, Sr.)

Schedule A

CARLISLE PACKING COMPANY

Cost of Production

Sales		779,538.16
Deduct:		
Packing Cost	57,060.90	
Selling Expense	19,921.12	
Reconditioning	12.03	
Collection & Exchange	165.06	
Freight and Cartage	2.92	
Swells	70.89	
Samples	286.42	
Handling & Storage	3,234.08	
Labeling	652.23	
Insurance	3,326.66	
Fish Purchased	56,469.27	
Trap Operations	56,960.09	
Boat Operations	20,417.27	
Mess House	5,282.21	
Manager's Residence	1,191.41	
Office Expense	1,793.54	
Licenses & Taxes	3,635.54	
Repairs	2,254.77	
Telephone and Telegraph	720.16	
Miscellaneous	642.49	
	234,099.06	
Add:		
Inventory November 30, 1926	701,913.30	
	936,012.36	
Deduct:		
Inventory November 30, 1927	175,020.00	760,992.36
		18,545.80

[Copies 3. Typed by N. W. B. Date 3/12/28. Compared F. S. to R. D. Footings Chkd. N. W. B.]

(Testimony of Frank Wright, Sr.)

Schedule I

CARLISLE PACKING COMPANY

			Depreciation
Buildings & Docks	48,276.98		
Machinery & Equipment	80,205.99		
Furniture and Fixtures	712.16		
Mess House Fixtures	1,100.11		
Store Fixtures	566.53		
Telephone & Cable Lines	2,500.00		
	133,361.77	@ 7½%	10,002.14
Floating Equipment	58,560.52	@ 7½%	4,392.04
Seattle Drums	5,006.80	@ 20%	1,001.36
Seattle Furniture & Fixtures	2,779.57	@ 20%	555.91
			15,951.45
Prior Years			153,756.85
			169,708.30

[Copies 3. Typed by R. D. Date 3/12/28. Compared F. S. to R. D. Footings Chkd. N. W. B.]

AFFIDAVIT

We, the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year as stated, pursuant to the Revenue Act of 1926 and the Regulations issued under authority thereof.

[Corporate Seal] .....

President

.....

Treasurer

Sworn to and subscribed before me this.....day of....., 1928.

[Notarial Seal] .....

(Signature of officer administering oath)

.....

(Title)

(Testimony of Frank Wright, Sr.)

Mr. WINTER: Q. Now, Mr. Wright, Schedule K, being the balance sheet, shows that at the beginning of the fiscal year December 1, 1926 undivided profits of $51,208.06, [14] does it not?

A. Yes.

Q. And at the end of the fiscal year November 30, 1927 undivided profits of $369,034.77?

A. Yes.

Q. Now that is in addition to the capital stock of $80,000.00?

A. Yes.

Q. That is also shown on the books of the corporation, is it not?

A. I presume so.

Q. Now, Mr. Wright, isn't it a fact that the Bank of California agreed to take over your Cordova and Bristol Bay Plants for $650,000.00?

A. Yes, they made a proposition to take them over for $650,000.00.

Q. The depreciated cost of this property, tangibles and intangibles was $346,106.87?

A. I believe so.

Q. During the period from 1920 up to the time you sold to the Bank, February 15, 1927, the company did buy floating equipment in its business, did it not?

A. Yes.

Q. It had to buy machinery and equipment too, did it not?

A. New equipment has to be bought every year.

(Testimony of Frank Wright, Sr.)

Q. Did it buy fishing boats, boats to be used in collecting fish?

A. Yes, some.

Q. Referring again to the balance sheet and Schedule K, income tax return, outside of the indebtedness to the Bank your accounts payable at the beginning of the year was $11,516.61? [15]

A. Yes.

Q. And at the end of the year they were $10,682.21?

A. Yes.

Q. And after the sale and transfer of these plants to the Bank of California, the company still owned the cannery and fishing equipment on the Sound, several trap locations and other property, did it not?

A. Yes.

Q. That is all.

Mr. OLSON: The Trustee rests.

Mr. WINTER: Now, if the Court please, the Government moves that its claim be allowed in the full amount as set forth in its claim heretofore filed.

Special REFEREE: The matter will be taken under advisement. Do you have any further evidence to introduce, Mr. Winter?

Mr. WINTER: No, that is all. [16]

On December 31, 1934 the Special Referee in Bankruptcy entered and filed his Decision and Order, as follows:

[Title of Court and Cause.]

DECISION ON OBJECTIONS OF TRUSTEE TO THE CLAIM OF THE UNITED STATES GOVERNMENT AS FILED AGAINST CARLISLE PACKING COMPANY, BANKRUPT, ON JUNE 1, 1934.

On June 1st, 1934 Honorable Alex McK. Vierhus, Collector of Internal Revenue for the collection district of Washington, acting for the United States Government, filed a duly verified claim with the Special Referee purporting to show taxes due the claimant in the sum of $20,515.52 with interest. The Trustee filed objections to the allowance of the claim and hearing was had before the Special Referee on July 18, 1934 at which time evidence was taken and argument heard. Briefs were thereafter submitted.

It appears that appeals from the taxes originally assessed were filed with the Board of Tax Appeals by the Carlisle Packing Company on April 2, 1931 and April 22, 1932; which appeals were consolidated for hearing and were heard before the Board on September 15, 1933. On December 6, 1933 the Board promulgated its opinion holding that the petitioner realized taxable profit on the transaction involved. (29 B. T. A. 90, 222527-33). (333CCH 7514).

The question involved in the appeal as presented to the Board of Tax Appeals was whether the Carlisle Packing Company, Bankrupt herein, realized a taxable profit upon a certain transaction wherein the said Carlisle Packing Company transferred its salmon canning plants, fish equipment, contracts, leases, fish traps, trap locations, fishing rights, permits, seine boats and other equipment in Cordova, Alaska and at Bristol Bay, Alaska, to the Bank of California during the fiscal year of 1927 and received from the Bank of California on such transfer the notes of the Carlisle Packing Company in the sum of $650,000.00; which notes the said Carlisle Packing Company had previously given to the Bank for funds in that amount which it had theretofore borrowed. It appears that the depreciated book value of the property trans- [50] ferred to the Bank of California in lieu of the notes received from the Bank was $345,106.87, and the profit determined by the claimant and sustained by the Board of Tax Appeals in its decision was $303,893.13.

It appears that the Carlisle Packing Company did not on the hearing before the Board of Tax Appeals, nor does the Trustee now, question these figures.

It was, of course, the contention of the petitioner before the Board of Tax Appeals and of the Trustee here that the transfer of the plants and equipment under the circumstances herein related did not result in taxable profit and that, if the deter-

mination of the tax is corrected in this particular, then by reason of the net loss provision of the statute the deficiencies for the fiscal years of 1928 and 1929 disappear.

Two questions are presented to the Special Referee for decision:

FIRST: Whether the decision of the Board of Tax Appeals in the form in which the Special Referee now finds it must be taken as res adjudicata or binding on the bankruptcy court, and

SECOND: (Assuming the first question be answered in the affirmative.) Whether the Carlisle Packing Company did in fact realize a taxable profit upon the transfer of its properties as heretofore set forth.

It appears that following the decision of the Board of Tax Appeals promulgated by the Board on December 6, 1933, the Board entered two Orders of Deficiency on January 4, 1934 for the fiscal years ending November 30, 1927 and November 30, 1928, in the respective amounts of $12,429.82 and $1,435.49, and also showing a deficiency in income taxes for the fiscal year ending November 30, 1929 in the amount of $1,472.88. On January 10, 1934 a receiver for the Carlisle Packing Company was appointed [51] by the Superior Court of the State of Washington for the County of Whatcom. On January 12, 1934 a summary telegraphic assessment was made by the Commissioner of Internal Revenue in accordance with the decision of the Board of Tax Appeals. On February 9, 1934 the Carlisle Pack-

ing Company was adjudicated bankrupt and S. P. Kelly was appointed Trustee. No appeal was taken by the Carlisle Packing Company, the receiver, or the Trustee in bankruptcy from the decision of the Board of Tax Appeals and the time for appeal expired on April 4, 1934.

The Revenue Act of 1932 Section 274(a) is as follows:

REVENUE ACT OF 1932.

Section 274(a)—Immediate Assessment.—Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts or additions to the tax provided for by law) determined by the Commissioner on respect of a tax imposed by this title upon such taxpayer shall, despite the restrictions imposed by section 272(a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance

> of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

The Special Referee believes that claimant in denying the jurisdiction of the Special Referee and of the District Court to review the decision of the Board of Tax Appeals has given too much emphasis to the statutes governing the collection of taxes and not sufficient credit to the provisions of the Bankruptcy Act.

Section 64(a) of the Bankruptcy Act (as amended) reads as follows: [52]

> "The Court shall order the Trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality, and in case any question arises as to the amount of legality of any such tax, the same shall be heard and determined."

Article 1191, Section 274, page 313 Department Regulations 77 reads in part as follows:

> "Bankruptcy courts have complete jurisdiction under section 64(a) of the National Bankruptcy Act to determine all disputes regarding the amount and validity of the taxes of a bankrupt."

It appears to us that this reasoning is based on broad and general principles of law. Every man is entitled to his day in court. It may be asked then:

When have the creditors of the Bankrupt had their day in court?

The position of claimant as related to the Carlisle Packing Company prior to bankruptcy is entirely different from its position following the adjudication in bankruptcy. Prior to bankruptcy no one was interested in the estate, except the taxpayer itself. Immediately upon adjudication in bankruptcy the rights of a host of creditors claiming the protection of the bankruptcy law and of this court intervene and the Special Referee is convinced that the bankruptcy court is not a puppet to do the bidding of a coordinate branch of the government but is in fact a responsible agent set up by the bankruptcy laws for the protection of all of the creditors of the bankrupt estate.

The intervention of bankruptcy in this case seems to distinguish it from the cases cited by the claimant and as noted above, the Special Referee believes that the bankruptcy court has a peculiar function which distinguishes its jurisdiction from the jurisdiction of courts of law or equity after the final decision of the Board of Tax Appeals and believes that the language of the Internal Revenue Act of 1932 when read in con- [53] junction with the language of the Bankruptcy Act peculiarly distinguishing this case and establishes the jurisdiction of the Special Referee and of the bankruptcy court in these proceedings.

We are of the opinion that the best position the claimant can assume is that the Board of Tax Ap-

peals and the Bankruptcy Court have concurrent jurisdiction in this matter. It is our opinion, however, that the decision of the Board of Tax Appeals is not binding upon the Bankruptcy Court. This position is sustained by General Counsel Memorandum 1 (G. C. M. 1, V-27-2816) issued by Honorable A. W. Gregg, General Counsel of the Bureau of Internal Revenue in the following language:

> "Section 282(a)" (which is Section 274(a) 1932 Act heretofore set forth.) "does not seem to provide for a dismissal of a petition filed by a taxpayer with the Board of Tax Appeals for the redetermination of the deficiency, if such petition was filed with the Board prior to the adjudication of bankruptcy of a taxpayer in a bankruptcy proceeding and prior to the immediate assessment provided for in section 282(a). It would therefore seem that in such a case the taxpayer, or the legal representative, might prosecute the petition in the Board of Tax Appeals to final determination before said Board, but whatever might be the final decision of the Board would not seem not to be binding upon the bankruptcy court in passing upon any claim for deficiency filed with said court, as provided in section 282(a). This is emphasized by the provisions contained in subdivisions (b) and (c) of Section 282, which reads:"

Section 282:

> (b) "Any portion of the claim allowed in such bankruptcy or receivership proceeding

which is unpaid shall be paid by the taxpayer upon notice and demand from the collector after the termination of such proceeding, and may be collected by distraint or proceeding in court within six years after termination of such proceeding.

(c) If the amount of such portion of the claim is not paid in full within 10 days from the date of notice and demand from the collector, then there shall be collected as a part of such amount interest upon the unpaid portion thereof at the rate of 1 per centum a month from the date of such notice and demand until payment. Extensions of time for such payment may be had in the same manner and subject to the same provisions and limitations as are provided in subdivision (k) of section 274 in the case of a deficiency in a tax imposed by this title." [54]

The Special Referee is of the opinion that the bankruptcy court and its Special Referee has jurisdiction in the premises and that the ruling of the Board of Tax Appeals is not res adjudicata and is not binding upon the Special Referee, or the court.

Taking up the second question: Whether the bankrupt realized a profit upon the transfer of its plants and equipment, heretofore described, to the Bank of California during the fiscal year of 1927 for the delivery to the Bankrupt corporation of $650,000.00 in notes of the corporation given by the corporation to the Bank for money loaned by the Bank to it.

The Special Referee is satisfied that this transfer was in no sense of the word a sale and that the claimant in considering same as a sale is utterly in error. Plainly on the evidence adduced here and on all the facts, this was nothing more than a liquidation proceeding which completely wiped out the business of the Carlisle Packing Company in the territory of Alaska. When the claimant refers to the operations of the Carlisle Packing Company subsequent to 1927 it must be remembered that these operations were largely outside of the territory of Alaska and had little or nothing to do with the operations in Alaska and shown in the record herein.

It is admitted that in addition to the $650,000.00 credit given by the Bank, additional credit was given for a salmon pack which was held as collateral by the Bank. Additional credit was given for other collateral and the net result of the transaction was that the Carlisle Packing Company ceased to be an operating concern in the territory of Alaska. To call this a sale would be to twist the common meaning of words as used in our ordinary language. It is elementary that [55] the legal nature of a transaction is to be determined by its substance and intention of the parties and not by mere form.

Touching the question of the insolvency of the Carlisle Packing Company at the time this transaction was made, the Special Referee believes that an examination of the record and of the balance

sheet of the Carlisle Packing Company will convince anyone that at the time of this transfer the corporation was in fact insolvent.

The question arises as to the character of taxable income. The definition of income laid down by the United States Supreme Court in Eisner v. Macomber, 252 U. S. 189, 40 Supreme Court 189, 64 Law Edition 521, has come to be recognized as the rule in this matter.

The Court says:

> "After examining dictionaries in common use (Bouvier's Law Dict.; Standard Dict.; Webster's Int. Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of August 5, 1909 (36 Stat. at L. 11, chap. 6), (Stratton's Independence v. Howbert, 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136; Doyle v. Mitchell Bros. Co. 247 U. S. 179, 185, 62 L. ed. 1054, 1059, 38 Sup. Ct. Rep. 467): "Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case (pp. 183, 185).
>
> Brief as it is it indicates the characteristic and distinguishing attribute of income, essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed

chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words as either overlooked or misconceived—"derived —from—capital,"—"the gain—derived—from —capital," etc. Here we have the essential matter; not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital, however invested or employed, and coming in, being "derived," that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit, and disposal; that is income derived from property. Nothing else answers the [56] description."

The Eisner v. Macomber case as pointed out in claimant's brief here was concerned with a stock dividend but the validity of the definition of taxable income is not to be lessened thereby and surely the definition of the Court may be applied generally as a principle and not in the narrower sense suggested by the brief of claimant.

It will be noted Eisner v. Macomber, citing the Doyle case, provides for profit gained through sale or conversion of capital assets. As has been pointed out heretofore, we do not consider the transfer in the instant case a sale, but merely a liquidation proceeding, and in any event, we cannot believe that the consequent changes on the books of the taxpayer

constituted taxable income or profit under the definition laid down in Eisner v. Macomber.

We believe the instant case is parallel with the case of the Dallas Transfer and Terminal Warehouse Co. v. Commissioner of Internal Revenue 70 F. (2nd) 95, decided by the Circuit Court of Appeals of the Fifth Circuit April 12, 1934. The facts as set forth in the opinion of the Court make the two cases practically identical. If the reasoning of that case is sound and the principle therein enunciated is to be followed, we do not see how claimant can prevail here.

The situation arising in the Dallas Transfer case and also in the instant case is covered by Article 49 of Section 231 of Regulations 69 Revenue Act of 1926, reading as follows:

> "FORGIVENESS OF INDEBTEDNESS—The cancellation and forgiveness of indebtedness may amount to a payment of income, to a gift, or to a capital transaction, dependent upon the circumstances. If, for example, an individual performs services for a creditor, who in consideration thereof cancels the debt income to that amount is realized by the debtor as compensation for his services. [57] If, however, a creditor merely desires to benefit a debtor and without any consideration cancels the debt, the amount of the debt is a gift from the creditor to the debtor and need not be included in the latter's gross income."

We are of the opinion that the Carlisle Packing Company did not realize taxable income or profit from the transfer of certain assets to the Bank of California in the fiscal year of 1927 and the return of its notes in the sum of $650,000.00 upon such transfer.

It appears to be admitted that if this deficiency is disallowed then the deficiencies assessed for the years 1928 and 1929 will be wiped out.

The claim filed by claimant with the Special Referee June 1, 1934 is, therefore, disallowed in full.

TIM HEALY,
Special Referee.

[Endorsed]: Filed Dec. 31, 1934. [58]

On January 7, 1935 the United States, by its attorneys, served and filed Exceptions and Objections to the Decision and Order of the Special Referee, as follows:

[Title of Court and Cause.]

EXCEPTIONS TO DECISION AND ORDER ON OBJECTIONS OF TRUSTEE TO CLAIM OF THE UNITED STATES GOVERNMENT AS FILED AGAINST CARLISLE PACKING COMPANY, BANKRUPT, ON JUNE 1, 1934.

Comes now the United States of America by J. Charles Dennis, United States Attorney, Gerald

Shucklin, Assistant United States Attorney, and Thomas R. Winter, Special Attorney, Bureau of Internal Revenue, and excepts to the Decision and Order of the Referee, entered and filed December 31, 1934, on the following grounds:

1. That the said Decision and Order is in error in holding that the decisions of the Board of Tax Appeals in the same matters, having become final and from which no appeal can be taken, are not res adjudicata.

2. That said Decision and Order is in error in holding that while the jurisdiction of the Board of Tax Appeals and the Bankruptcy Court are concurrent, the decisions of the Board are not, however, binding on the Bankruptcy Court.

3. That said decision and Order is in error in failing to find the jurisdiction of the Board of Tax Appeals and the Bankruptcy Court is concurrent and the decisions of the Board of Tax Appeals are binding on the Bankruptcy Court.

4. That said Decision and Order is in error in finding that the Carlisle Packing Company did not realize a profit upon the transfer of its salmon canning plants, fishing equipment, contracts, leases, fish traps, trap locations, fishing rights and permits, etc., at Cordova, and Bristol Bay, Alaska, to the Bank of California during the fiscal year 1927 for the sum of $650,000.00 paid the Carlisle [59] Packing Company by the satisfaction, cancellation and return of notes in that amount which the

Carlisle Packing Company had previously executed and given to the bank for funds in that amount theretofore borrowed.

5. That said Decision and Order is in error in failing to find that the Carlisle Packing Company realize a profit upon the transfer of its salmon canning plants, fishing equipment, contracts, leases, fish traps, trap locations, fishing rights and permits, etc., at Cordova, and Bristol Bay, Alaska, to the Bank of California during the fiscal year 1927 for the sum of $650,000.00 paid the Carlisle Packing Company by the satisfaction, cancellation and return of notes in that amount which the Carlisle Packing Company had previously executed and given to the bank for funds in that amount theretofore borrowed.

6. That said Decision and Order is in error in finding that the Carlisle Packing Company at the time of the transfer of the plants, etc., was, in fact, insolvent.

7. That said Decision and Order is in error in that the claim of the United States of America, Petitioner, in the sum of $20,515.52, plus interest from January 12, 1934, is correct in amount and duly proved and that the same is for Internal Revenue taxes due the United States and is entitled to be paid before all other claims, the priority of the United States for payment of taxes being fully determined by Section 3466 R. S. and Section 64(a) of the Bankruptcy Act as amended.

8. That said Decision and Order is in error in disallowing in full the claim filed by the Petitioner with the Special Referee June 1, 1934.

9. That said Decision and Order is contrary to the [60] evidence, the weight of the evidence, and otherwise contrary to law.

J. CHARLES DENNIS
United States Attorney.
GERALD SHUCKLIN
Ass't. United States Attorney
THOMAS R. WINTER
Special Attorney, Bureau of Internal Revenue.

Service admitted and copy received 1/5/35.
RALPH O. OLSON
Atty. for Trustee.

[Endorsed]: Filed Jan. 7, 1935. [61]

On January 7, 1935 the Special Referee entered and signed the following Order:

[Title of Court and Cause.]

ORDER AND ALLOWANCE OF EXCEPTIONS

The claimant, United States of America by J. Charles Dennis, United States Attorney, Gerald Shucklin, Assistant United States Attorney, and Thomas R. Winter, Special Attorney, Bureau of

Internal Revenue, having filed written exceptions to the Special Referee's Decision and Order entered and filed December 31, 1934, and the Special Referee being fully advised in the premises,

IT IS HEREBY ORDERED that the Exceptions thereto are hereby allowed.

Dated this 7th day of January, 1935.

TIM HEALY
Special Referee.

O. K. as to form.

RALPH O. OLSON
Atty. for Trustee.

[Endorsed]: Filed January 7th, 1935. [62]

On January 7, 1935 Notice of filing Petition of the United States for review of the Special Referee's Decision and Order was served and filed, as follows:

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To S. P. KELLY, Esq., Trustee in Bankruptcy:
To RALPH OLSON, Esq., Attorney for Trustee:

Please take notice that a Petition for Review in the above-entitled cause will be filed with the Special Referee at Bellingham, Washington, on January

7, 1935, a copy of which petition is hereto attached and made a part of this Notice.

J. CHARLES DENNIS
United States Attorney.
GERALD SHUCKLIN
Ass't. United States Attorney
THOMAS R. WINTER
Special Attorney, Bureau of Internal Revenue.

Service admitted and copy received 1/5/35.
RALPH O. OLSON
Atty. for Trustee.

[Endorsed]: Filed January 7, 1935. [63]

On January 7, 1935 petition of the United States for review of decision and Order of Special Referee was served and filed, which petition is as follows:

[Title of Court and Cause.]

PETITION OF THE UNITED STATES FOR REVIEW OF REFEREE'S DECISION AND ORDER.

Your Petitioner, United States of America, by J. Charles Dennis, United States Attorney, Gerald Shucklin, Assistant United States Attorney, and Thomas R. Winter, Special Attorney, Bureau of Internal Revenue, is a creditor of the above-named

Bankrupt and, as such, was a party to the following certain proceedings in said bankruptcy pending before Honorable Tim Healy as Special Referee in Bankruptcy in charge thereof, to-wit:

On June 1, 1934 Alex McK. Vierhus, Collector of Internal Revenue for the collection district of Washington, a duly authorized agent for the United States in this behalf, filed a verified proof of claim with the Special Referee for taxes due the United States in the sum of $20,515.52, together with interest.

That on June 18, 1934 S. P. Kelly, Esq., Trustee, by letter to Thomas R. Winter, one of the attorneys for the Petitioner, objected to the claim of the United States.

That by agreement on or about June 25, 1934 the reasons assigned in the letter of June 18, 1934 were considered as specific objections to the claim of the United States of America without further pleadings therein. [64]

That hearing thereon was had before the Special Referee on July 18, 1934, at which time and as further proof of the claim of the Petitioner, United States of America, its attorneys filed with the Special Referee a certified copy of the decision of the United States Board of Tax Appeals in the case of In re Carlisle Packing Company, promulgated December 6, 1933 (29 B.T.A. 90, 222, 527-33) (333 C.C.H. 7514), and certified copies of the United States Board of Tax Appeals' two orders for de-

ficiency dated January 4, 1934 for income taxes as set forth in the proof of claim.

That at which time evidence was taken and arguments heard. Briefs were thereafter submitted to the Special Referee.

That thereafter and on or about December 31, 1934 the Special Referee entered and filed his final Decision and Order on Objections of the Trustee to the Claim of the United States Government as filed against Carlisle Packing Company, Bankrupt, on June 1, 1934. A copy of said Decision and Order is attached hereto and made a part hereof.

To which said petition and Order Petitioner duly excepted and said Exceptions were duly allowed.

1. That the said Decision and Order is in error in holding that the decisions of the Board of Tax Appeals in the same matters, having become final and from which no appeal can be taken, are not res adjudicata.

2. That said Decision and Order is in error in holding that while the jurisdiction of the Board of Tax Appeals and the Bankruptcy Court are concurrent, the decisions of the Board are not, however, binding on the Bankruptcy Court. [65]

3. That said Decision and Order is in error in failing to find the jurisdiction of the Board of Tax Appeals and the Bankruptcy Court is concurrent and the decisions of the Board of Tax Appeals are binding on the Bankruptcy Court.

4. That said Decision and Order is in error in finding that the Carlisle Packing Company did not realize a profit upon the transfer of its salmon canning plants, fishing equipment, contracts, leases,

fish traps, trap locations, fishing rights and permits, etc. at Cordova, and Bristol Bay, Alaska, to the Bank of California during the fiscal year 1927 for the sum of $650,000.00 paid the Carlisle Packing Company by the satisfaction, cancellation and return of notes in that amount which the Carlisle Packing Company had previously executed and given to the bank for funds in that amount theretofore borrowed.

5. That said Decision and Order is in error in failing to find that the Carlisle Packing Company realized a profit upon the transfer of its salmon canning plants, fishing equipment, contracts, leases, fish traps, trap locations, fishing rights and permits, etc., at Cordova, and Bristol Bay, Alaska, to the Bank of California during the fiscal year 1927 for the sum of $650,000.00 paid the Carlisle Packing Company by the satisfaction, cancellation and return of notes in that amount which the Carlisle Packing Company had previously executed and given to the bank for funds in that amount theretofore borrowed.

6. That said Decision and Order is in error in finding that the Carlisle Paeking Company at the time of the transfer of the plants, etc., was, in fact, insolvent.

7. That said Decision and Order is in error in that the claim of the United States of America, Petitioner, in [66] the sum of $20,515.52, plus interest from January 12, 1934, is correct in amount and duly proved and that the same is for Internal Revenue taxes due the United States and is entitled to be paid before all other claims, the priority

of the United States for payment of taxes being fully determined by Section 3466 R. S. and Section 64(a) of the Bankruptcy Act as amended.

8. That said Decision and Order is in error in disallowing in full the claim filed by the Petitioner with the Special Referee June 1, 1934.

9. That said Decision and Order is contrary to the evidence, the weight of the evidence, and otherwise contrary to law.

WHEREFORE, Petitioner prays that said Decision and Order be reviewed and reversed and that the claim of the Petitioner be allowed as a priority claim as provided by Section 3466 R. S. and Section 64(a) of the Bankruptcy Act as amended, against the bankruptcy estate in the sum of $20,515.52 plus interest from January 12, 1934 at the rate of 6% per annum until paid.

J. CHARLES DENNIS
United States Attorney.
GERALD SHUCKLIN
Ass't. United States Attorney.
THOMAS R. WINTER
Special Attorney, Bureau of Internal Revenue.

Service admitted and copy received 1/5/35.
RALPH O. OLSON
Atty. for Trustee. [67]

State of Washington,
County of King—ss.

I, Gerald Shucklin, being first sworn upon oath depose and says that I am an Assistant United

States Attorney for the Western District of Washington, and as such, make this verification for and on behalf of the United States of America as its attorney; that I have read the foregoing Petition for Review, know and understand the contents thereof, and the matters stated therein are true of my own knowledge, except as to those matters which are stated upon information and belief, and as to those matters I believe the same to be true.

GERALD SHUCKLIN
Assistant United States Attorney.

Subscribed and sworn to before me this 4th day of January 1935.

[Notarial Seal] JOHN AMBLER
Notary Public.

[Endorsed]: Filed January 7, 1935. [68]

Thereafter and on the 18th day of February, 1935, the following order was made and entered:

[Title of Court and Cause.]

ORDER

(Admitting Trustee's Exhibits B-1 and B-2.)

The above-entitled matter having come on for hearing before the above-entitled Court on February 18, 1935, and Thomas R. Winter, of counsel for the United States, having stated in open Court that the claim of the United States filed against the Carlisle Packing Company, Bankrupt, on June 1,

1934 and which has been disallowed by the Special Referee covers alleged taxes due for the fiscal years ended November 30, 1927, November 30, 1928, and November 30, 1929, and that since a determination of taxes due for the fiscal year 1927 involves the question of a loss which might be carried forward as a deduction to eliminate any taxable income for the fiscal years 1928 and 1929, and whereas the parties by their attorneys on said date in open Court stipulated that in order to complete the record the income tax returns of the Carlisle Packing Company should be admitted as exhibits and made a part of the record on review.

NOW, THEREFORE, upon motion of Thomas R. Winter.

IT IS HEREBY ORDERED that the certified photostat copies of income tax returns of the Carlisle Packing Company for the fiscal years ended November 30, 1928 and November 30, 1929, be, and the same are hereby admitted, marked as trustee's Exhibits B-1 and B-2, respectively, and made a part of the record herein.

Done this 4th day of March 1935, as of March 1st, 1935.

EDWARD E. CUSHMAN
Judge.

[Endorsed]: Filed Mar. 4, 1935. [69]

BE IT REMEMBERED, that on the 6th day of May, 1935, the petition of the United States for review of the decision of the Special Referee, Tim Healy, sustaining the objections and disallowing the claim of the United States Government for taxes, came on for review before the above entitled Court, Honorable Edward E. Cushman presiding, and the following proceedings were had and done: [70]

[Title of Court and Cause.]

ORDER.

(Disaffirming Referee and Allowing Claim for Taxes.)

The above matter having come on before the Court upon the Petition of the United States for review of the Order of the Special Referee dated December 31, 1934 denying the claim filed by the Collector of Internal Revenue for the Collection District of Washington, acting for the United States Government, for $20,515.52 plus interest at 6% per annum from January 12, 1934 to date paid, on account of income tax liabilities because of asserted deficiencies for the fiscal years ended November 30, 1927, November 30, 1928, and November 30, 1929, and the Court on April 22, 1935 having filed his written Memorandum Decision upon the review of the Special Referee's Order, and this matter, upon written notice to the parties, having been noted for hearing this 6th day of May, 1935, it is hereby

ORDERED, ADJUDGED AND DECREED that the Special Referee's said Order be and is hereby disaffirmed, and that the said claim of the United States Government be, and is hereby allowed as a priority claim as provided by Section 3466 R. S. and Section 64(a) of the Bankruptcy Act, as amended, against the estate of the Carlisle Packing Company, a corporation, Bankrupt, in the sum of $20,515.52, plus interest from January 12, 1934 at the rate of 6% per annum until paid, and that the said claim be paid.

Done at Seattle this 6th day of May, 1935.

EDWARD E. CUSHMAN
Judge.

Trustee excepts to the above order and his exception is allowed.

EDWARD E. CUSHMAN
Dist. Judge.

Dated May 6th, 1935. [71]

Intervenor Frank Wright excepts to the above order and his exception is allowed.

EDWARD E. CUSHMAN,
Dist. Judge.

Dated May 6th, 1935.

[Endorsed]: Filed May 6, 1935. [72]

That thereafter and on the 1st day of June, 1935, a petition for appeal from the order of the above entitled court was filed herein, and order allowing said appeal was made and entered, which said peti-

tion and order are in words and figures, as follows, to wit:

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Edward E. Cushman, United States District Judge:

S. P. Kelly, Trustee in Bankruptcy for the Carlisle Packing Company, a corporation, bankrupt, feeling himself aggrieved by the order entered in the above entitled matter on the 6th day of May, 1935, wherein and whereby the order of the Special Referee herein, was disaffirmed, and wherein and whereby an order of said Court was entered allowing the claim of the United States Government as a priority claim as provided by section 3466 R. S. and section 64(a) of the Bankruptcy Act, as amended, against the estate of the Carlisle Packing Company, a corporation, bankrupt, in the sum of $20,515.52, plus interest from January 12, 1934, at the rate of six per cent. per annum until paid, and wherein and whereby an order of said Court was entered ordering that said claim be paid, does hereby appeal from said order disaffirming said order of said special Referee and from said order allowing the said claim of the United States Government as a priority claim as provided by section 3466 R. S. and section 64(a) of the Bankruptcy Act, as amended, against the estate of the Carlisle Packing Company, a corporation, bankrupt, in the sum of $20,515.52, plus interest from January 12, 1934, at

the rate of six per cent per annum, until paid, and from said order ordering that said claim be paid, to the United States Circuit (Court) of Appeals for the Ninth Circuit for the reasons and upon the grounds specified in the ASSIGNMENT of ERRORS which is filed herewith.

The said Trustee prays that this appeal from said order disaffirming the order of the Special Referee herein, and from said [73] order allowing the said claim of the United States Government as a priority claim as provided by section 3466 R. S. and section 64(a) of the Bankruptcy Act as amended against the estate of the Carlisle Packing Company, a corporation, bankrupt, in the sum of $20,515.52, plus interest from January 12, 1934, at the rate of six per cent per annum, until paid, and from said order ordering that said claim be paid, be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit within the time and in the manner provided by law and agreeable to the rules promulgated by said Court.

Your petitioner further prays that a proper order be made touching the security to be required of him to perfect his appeal.

RALPH O. OLSON
Attorney for said Trustee
507 Bellingham Nat'l Bank Bldg.,
Bellingham, Washington

ORDER ALLOWING APPEAL.

The foregoing petition is hereby granted and the appeal from said order disaffirming the said order of said special referee, and also the appeal from said order allowing the claim of the United States Government as a priority claim as provided by section 3466 R. S. and section 64(a) of the Bankruptcy Act, as amended, against the estate of the Carlisle Packing Company, a corporation, bankrupt, in the sum of $20,515.52, plus interest from January 12, 1934, at the rate of six per cent per annum, until paid, and also the appeal from said order ordering that said claim be paid are each allowed and the giving of bond shall not be required of the said trustee.

Done in open Court this 1st day of June, 1935.

EDWARD E. CUSHMAN
United States District Judge. [74]

Received a copy of the foregoing Petition for Appeal and of the foregoing Order allowing appeal on this 1st day of June, 1935.

J. CHAS. DENNIS
United States Attorney
GERALD SHUCKLIN
Assistant United States Attorney
THOMAS R. WINTER
Attorneys for Petitioner and Appellee.

.....

Attorney for Objecting Creditor,
Frank Wright.

That thereafter and on the 1st day of June, 1935, assignment of errors was filed herein, which is in words and figures as follows, to wit:

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

COMES now S. P. Kelly, Trustee in Bankruptcy, for the Carlisle Packing Company, a corporation, bankrupt, by Ralph O. Olson, one of his attorneys, and complains of the final order made and entered in the above entitled matter on the 6th day of May, 1935, and says that the said order is erroneous and unjust to the said trustee and makes and files the following Assignment of Errors upon which he will rely upon the prosecution of the appeal in the above entitled matter from the said order disaffirming the order of the special referee herein, and from said order allowing the claim of the United States Government as a priority claim against the estate of said bankrupt and from the said order ordering the said claim be paid. [75]

I.

The Court erred in holding that a decision of the Board of Tax Appeals is res adjudicata and binding upon the bankruptcy court, the said decision of the Board of Tax Appeals not having become final before the adjudication in bankruptcy.

II.

The Court erred in not holding that the Bankruptcy Court can review the final decision of the Board of Tax Appeals.

III.

The Court erred in disaffirming the order of the Special Referee and in not affirming the same for the reason that the claim of the United States Government disallowed by the said order of the said Special Referee is for taxes claimed to be due to the United States and questions arising as to the amount or legality of any such taxes are properly heard and determined by the Court in Bankruptcy, and the Court in Bankruptcy has jurisdiction of all such questions, regardless of the ruling thereon by the Board of Tax Appeals.

IV.

The Court erred in allowing the claim of the United States Government as a priority claim against the estate of said Bankrupt for the reason that said claim is based upon asserted income tax deficiencies during the fiscal years of 1926, 1927, and 1928, when, in fact, there was no taxable income unreported or upon which said bankrupt corporation did not pay income taxes during the said years and no income tax deficiencies of any nature by said bankrupt corporation during said years.

V.

The Court erred in not finding that the Carlisle Packing Company did not realize a taxable profit upon the transfer of its salmon canning plants, fishing equipment, contracts, leases, fish [76] traps, trap locations, fishing rights and permits, etc., at Cordova, and Bristol Bay, Alaska, to the Bank of California during the fiscal year 1927, for the sum

of $650,000.00 paid the Carlisle Packing Company by the satisfaction, cancellation and return of notes in that amount which the Carlisle Packing Company had previously executed and given to the bank for funds in that amount theretofore borrowed.

VI.

The Court erred in not finding that the Carlisle Packing Company was, in fact, insolvent, at the time of the transfer of the plant, etc., to the Bank of California in satisfaction of its obligation to said bank in the year 1927.

VII.

The Court erred in ordering that said claim of the United States be paid for the reasons,

(a) That no sum of money whatsoever is due to the said Government of the United States from the said bankrupt corporations, and,

(b) Said order is not supported by the facts out of which the alleged claim of the government arises and,

(c) is contrary to law.

VIII.

The Court erred in not ordering that the claim of the Government of the United States against the estate of the said bankrupt corporation be disallowed.

IX.

The Court erred in allowing the claim of the government of the United States against the estate of the said bankrupt.

X.

The Court erred in ordering that said claim of the said government of the United States be paid. [77]

WHEREFORE the Trustee prays that said order be reversed and further prays that the said order of the said special referee be affirmed, and further prays that the said claim of the government of the United States be disallowed as a claim against the estate of the said bankrupt, corporation, and further prays that this matter be remanded to the District Court of the United States for the Western District of Washington, Northern Division with direction to enter an order herein disallowing the claim of the government of the United States against the estate of the said bankrupt corporation.

RALPH O. OLSON,
Attorney for Trustee and Appellant.

Service admitted and copy received this 1st day of June, 1935.

J. CHAS. DENNIS,
United States Attorney.
GERALD SCHUCKLIN,
Asst. United States Attorney.
THOMAS R. WINTER,
Attorneys for Petitioner and Appellee.

.....,
Attorney for Objecting Creditor,
Frank Wright.

That thereafter and on the 18th day of June, 1935, a citation on appeal was filed herein, which is in words and figures as follows, to-wit:

[Title of Court and Cause.]

CITATION ON APPEAL.

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE UNITED STATES OF AMERICA AND TO THE COLLECTOR OF INTERNAL REVENUE for the United States of America and to the COLLECTOR OF INTERNAL REVENUE for the Collection District of Washington, Claimants in the above entitled matter, GREETING:

WHEREAS, S. P. Kelly, trustee in bankruptcy for the Carlisle Packing Company, a corporation, bankrupt, has appealed [78] to the United States Circuit Court of Appeals for the Ninth Circuit from the order rendered and entered in the District Court of the United States for the Western District of Washington, Northern Division, on the 6th day of May, 1935, in which order the order of the special referee herein was disaffirmed, and the claim of the United States Government was allowed as a priority claim against the estate of the said Carlisle Packing Company, a corporation, bankrupt, as provided by section 3466 R. S., and section 64(a) of the Bankruptcy Act, as amended, in the sum of $20,515.52, plus interest from January 12, 1934, at the rate of six per cent per annum, until paid, and in which said order said claim was ordered paid;

YOU ARE, THEREFORE, HEREBY CITED AND ADMONISHED to be and appear before the said United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, within thirty days from the date hereof to show cause, if any there be, why said order should not be corrected and reversed and speedy justice should not be done by the parties in that behalf.

WITNESS the Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, Northern Division, this 1st day of June, A. D., 1935.

EDWARD E. CUSHMAN
United States District Judge.

Service of the within citation on appeal and receipt of copy thereof is hereby admitted and acknowledged on behalf of the United States Government, Appellee, this 1st day of June, 1935.

J. CHAS. DENNIS
United States Attorney
GERALD SHUCKLIN
Asst. United States Attorney
THOMAS R. WINTER
Attorneys for the United States Government, Claimant, and Appellee.

.....

Attorney for Objecting Creditor,
Frank Wright. [79]

That thereafter and on the 12th day of June, 1935, stipulation for enlargement of time to file record and return day of citation on appeal was filed herein, which is in words and figures as follows, to wit:

[Title of Court and Cause.]

STIPULATION FOR ENLARGEMENT OF TIME TO FILE RECORD AND RETURN DAY OF CITATION ON APPEAL.

It is hereby stipulated and agreed by and between S. P. Kelly, Trustee in Bankruptcy in the above entitled matter, and appellant herein, by and through Ralph O. Olson, his attorney, and the United States of America, Claimant and Appellee herein, by and through J. Charles Dennis, Gerald Shucklin and Thomas R. Winters, its attorneys, as follows, to-wit:

That the time for the filing of the record on appeal herein may be enlarged and the return day of the citation on appeal issued herein by the Honorable Edward E. Cushman, Judge of the United States District Court for the Western District of Washington, Northern Division, on the first day of June, 1935, may be extended for sixty days from and after its original date of expiration or sixty days from the 30th day of June, 1935.

Dated this 10 day of June, 1935.

RALPH O. OLSON
Attorney for S. P. Kelly, Trustee
in Bankruptcy herein, and Appellant.

J. CHARLES DENNIS
GERALD SHUCKLIN
THOMAS WINTERS
Attorneys for the United States
Government, Claimant and Appellee.

[Endorsed]: Filed June 12, 1935. [80]

That thereafter and on the 14th day of June, 1935, an order enlarging time to file record on appeal and extending return day of citation on appeal was made and entered, which is in words and figures as follows, to wit:

[Title of Court and Cause.]

ORDER ENLARGING TIME TO FILE RECORD ON APPEAL AND EXTENDING THE RETURN DAY OF CITATION ON APPEAL.

This matter coming on for hearing before the Court this day upon the stipulation of S. P. Kelly, Trustee in bankruptcy herein, and appellant herein, by and through Ralph O. Olson, his attorney, and the United States of America, Appellee herein, by and through J. Charles Dennis, Gerald Shucklin and Thomas R. Winters, Special Representative,

its attorneys, which said stipulation is now on file herein, and

IT APPEARING to the Court from said stipulation that the parties above named have agreed and stipulated that the time for filing the record on appeal herein may be enlarged and the return day of the citation on appeal herein issued by this Court on the first day of June, 1935, may be extended for a period of sixty days from its original return date or for sixty days from the 30th day of June, 1935, and,

The Court being fully advised in the premises,

IT IS HERE NOW ORDERED that the time for filing of the record on appeal herein be and it hereby is enlarged for sixty days from the 30th day of June, 1935, and,

Done at Tacoma, Wash. this 14th day of June, 1935.

EDWARD E. CUSHMAN
United States District Judge

Approved as to form:

RALPH O. OLSON
Attorney for S. P. Kelly, Trustee in Bankruptcy, and Appellant.

J. CHARLES DENNIS
GERALD SHUCKLIN
THOMAS R. WINTERS
Attorneys for the United States Government, Claimant and Appellee.

[Endorsed]: Filed June 14, 1935. [81]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To Edgar M. Lakin, Clerk of the Above Entitled Court:

YOU, AND EACH OF YOU, will please take notice, that the undersigned, Attorneys for the Trustee, Appellant, above named bankrupt, hereby serves upon you, and each of you, this Praecipe to indicate to you the portions of the records and files in the above entitled cause which said Trustee as Appellant desires to and will incorporate in the Transcript of Record on Appeal allowed herein on the 1st day of June, 1935, to have the order and Judgment hereinbefore rendered and entered herein, reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and the Clerk of said District Court will incorporate and include in said Transcript, the following:

1. Adjudication of bankruptcy and order of reference.
2. Statement of claim for taxes due the United States.
3. Objections to claim for taxes.
4. Abstract of record of proceedings had before the special referee, (including):
   (a) Testimony of Witnesses, George V. Whittle, G. L. Wakeman, and Frank Wright.
   (b) Claimant's Ex. 1, (Commissioner's Telegraphic Assessment List).
   Claimant's Ex. 2, (Decision of U. S. Board of Tax Appeals).

Claimant's Ex. 3, (Order of Deficiency in Income Tax, 1929).

Claimant's Ex. 4, (Order of Deficiency in Income Tax, 1927-1928).

(c) Trustee's Ex. B, (Certified photostat copy of Income Tax return, Carlisle Packing Co., for fiscal year ended Nov. 30, 1927).

Trustee's Ex. C, (Agreement transferring property, Carlisle Packing Company and Frank Wright to Bank of California, dated 15th of February, 1927).

(d) Order and decision of Referee sustaining objections and disallowing claim for taxes. [82]

(e) Exceptions to decision and order of Special Referee disallowing claim of United States Government for taxes.

(f) Order and allowance of exceptions by Special Referee.

(g) Notice of filing petition for review by U. S. District Judge of Special Referee's Decision.

(h) Petition of United States for review by U. S. District Judge of Special Referee's Decision and Order.

5. Order of District Judge Admitting Trustee's Exhibits, B-1, and B-2.
   (a) Exhibit B-1.
   (b) Exhibit B-2.
6. Order Disaffirming Referee and allowing claim for taxes.

7. Petition for appeal.
8. Assignment of errors.
9. Citation on appeal.
10. Stipulation enlarging time.
11. Order enlarging time.
12. Copy of this Praecipe.

RALPH O. OLSON,
Bellingham Nat'l Bk. Bldg.,
Bellingham, Washington,
GEORGE V. WHITTLE, C.P.A.,
Smith Tower,
Seattle, Washington,
STRATTON & KANE,
Smith Tower,
Seattle, Wash.,
Attorneys for S. P. Kelly,
Trustee & Appellant.

Service admitted and copy received, this 12 day of August, 1935.

THOMAS R. WINTER
Special Attorney, Bureau of Internal Revenue,
J. CHARLES DENNIS
United States Attorney,
GERALD SHUCKLIN
Ass't U. S. Attorney,
Attorneys for United States of America, Claimant. [83]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Edgar M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing cause as is required by praecipe of counsel filed and shown herein, except Trustee's Exhibits B, B-1 and B-2, the originals to be sent when court order secured, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant herein for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Act of Feb. 11, 1925) for making record, certificate or return, 240 folios at 15¢ $36.00

Certificate of Clerk to transcript of record .50

$36.50

[84]

I hereby certify that the above cost for preparing and certifying record, amounting to $36.50 has been paid to me by attorney for appellant.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said district, this 13th day of August, 1935.

[Seal] EDGAR M. LAKIN,
Clerk of United States District Court, Western District of Washington.
By F. W. MOSES,
Deputy.

[Endorsed]: No. 7942. United States Circuit Court of Appeals for the Ninth Circuit. S. P. Kelly, Trustee in Bankruptcy for the Carlisle Packing Company, a corporation, bankrupt, Appellant, vs. United States of America, and the Collector of Internal Revenue for the United States of America, and the Collector of Internal Revenue for the Collection District of Washington, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed August 14, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 7942

S. P. KELLY, Trustee in Bankruptcy for the Carlisle Packing Company, a corporation, bankrupt,

Appellant,

v.

UNITED STATES OF AMERICA, and the COLLECTOR OF INTERNAL REVENUE for the United States of America, and the COLLECTOR OF INTERNAL REVENUE for the Collection District of Washington,

Appellees.

MOTION

Comes now the appellee in the above entitled cause and moves the court that it be allowed to file and have printed as a part of the Transcript of Record the Memorandum Opinion of Honorable E. E. Cushman, Judge of the District Court of the United States for the Western District of Washington in the above entitled cause.

This motion is based upon the affidavit of J. Charles Dennis, United States Attorney for the Western District of Washington, and the stipulation with the appellants herein.

J. CHARLES DENNIS,
United States Attorney

So ordered.

CURTIS D. WILBUR
Senior U. S. Circuit Judge

United States of America,
Western District of Washington,
Northern Division.—ss.

J. CHARLES DENNIS, being first duly sworn, on oath deposes and says:

That he is United States Attorney for the Western District of Washington, and as such is attorney for the appellees in the above entitled cause.

That, through inadvertence, the Memorandum Opinion of Honorable E. E. Cushman, Judge of the District Court for the Western District of Washington, before whom the aforesaid cause was heard, was omitted from the Transcript of Record, that the same was not discovered by your affiant until he began to prepare his brief; and that, in accordance with Rule XIV of this Court, the same is necessary.

J. CHARLES DENNIS

Subscribed and sworn to before me this 21st day of January, 1936.

[Seal] GERALD SHUCKLIN
Notary Public in and for the State of Washington, residing at Seattle.

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated by and between S. P. Kelly, Trustee in Bankruptcy for the Carlisle Packing Company, appellant, and the United States of

America, and the Collector of Internal Revenue for the United States of America, and the Collector of Internal Revenue for the Collection District of Washington, appellees, by and through their respective counsel, that the attached Memorandum Opinion of Honorable E. E. Cushman, Judge of the District Court for the Western District of Washington, may be printed by the Clerk of this Court and may be considered as a part of the Transcript of Record on appeal.

RALPH O. OLSON
GEORGE V. WHITTLE C.P.A.
STRATTON & KANE
Attorneys for Appellant
J. CHARLES DENNIS
United States Attorney
J. A. PELLEGRINI
Assistant United States Attorney
Attorneys for Appellees.

United States District Court, Western District of Washington, Northern Division.

In Bankruptcy—No. 33183

In the Matter of
CARLISLE PACKING COMPANY,
a corporation,

Bankrupt.

MEMORANDUM DECISION UPON REVIEW OF REFEREE'S ORDER

Filed April 22, 1935.

Ralph Olson, Bellingham Nat'l Bk. Bldg., Bellingham, Wn., Murray L. Jones, and George V. Whittle,

Attorneys for Trustee,

J. Charles Dennis, U. S. Attorney, Seattle, Wn., Warren G. Magnusson, (formerly) Asst. U. S. Atty., and Thomas R. Winter, Spec. Atty., Bureau of Int. Rev.,

Attorneys for Petitioner,

E. D. Phelan, 1819 Smith Tower, Seattle, Wn.,

Attorney for Objecting Creditor, Frank Wright.

This matter is before the Court upon the petition of the United States for review of the Special Referee's decision denying a claim filed by the Collector of Internal Revenue for the Collection District of Washington, acting for the United States Government, for $20,515.52, and interest, on account of income tax liabilities because of asserted

deficiencies for the fiscal years ending November 30th, 1927, November 30, 1928 and November 30th, 1929.

The following statement is taken from a brief of Claimant:

"Preliminary Statement

The Carlisle Packing Company, on April 2, 1931 and April 22, 1932 filed appeals with the Board of Tax Appeals which were consolidated for hearing, involving the Federal income tax liabilities from deficiency letters dated February 3, 1931 and February 24, 1932, respectively, proposing deficiencies as follows:

Docket No.	Fiscal Year Ended	Amount
55209	Nov. 30, 1927	$12,429.82
55209	Nov. 30, 1928	1,435.49
64926	Nov. 30, 1929	1,472.88

The cases were heard by Honorable C. Rogers Arundell on September 15, 1933 at Seattle, Washington. The question presented by said appeals was, did the petitioner (Carlisle Packing Company) realize a profit upon the *sale* of its salmon canning plants, fishing equipment, contracts, leases, fish traps, trap locating fishing rights and permits, etc. at Cordova and at Bristol Bay, Alaska, to the Bank of California during the fiscal year 1927 for the sum of $650,000.00 paid petitioner by the satisfaction, cancellation and return of notes in that amount which the petitioner had previously executed and given to the Bank for funds in that amount

theretofore borrowed? (See Trustee's Objections to Government's claim in this proceeding).

The depreciated cost of the property *sold*, tangibles and intangibles, was $346,106.87, and the profit determined in the deficiency letter $303,893.13. (Amount of profit not in controversy).

The parties were allowed until November 1, 1933 to file proposed Findings of Fact and briefs. Proposed Findings and brief were filed November 1, 1933 on behalf of petitioner (Carlisle Packing Company) by George V. Whittle, its then counsel, who is now appearing as counsel for the Trustee in Bankruptcy in this proceeding. The Government also filed its brief and proposed Findings of Fact November 1, 1933.

On December 6, 1933 the Board of Tax Appeals promulgated its opinion, a printed copy of which is attached, holding that the petitioner realized taxable profit on the transaction above involved (29 B.T.A. 90, 222527-33). (333 CCH 7514)

On January 4, 1934 pursuant to the Board's decision promulgated December 6, 1933, the Board entered two orders of deficiencies in income taxes for the fiscal years ended November 30, 1927 and November 30, 1928 in the respective amounts of $12,429.82 and $1,435.49 and that there is a deficiency in income taxes

for the fiscal year ended November 30, 1929 in the amount of $1,473.88.

On January 10, 1934 Ralph Peasley was appointed Receiver of the Carlisle Packing Company by the Superior Court of the State of Washington for the County of Whatcom.

On January 12, 1934 a summary telegraphic assessment was made by the Commissioner of Internal Revenue in accordance with the decision of the Board of Tax Appeals.

On February 9, 1934 the Carlisle Packing Company was adjudicated a Bankrupt and S. P. Kelly was appointed trustee.

No appeal has been taken by either the Carlisle Packing Company, the Receiver or the Trustee in Bankruptcy from the decision of the Board of Tax Appeals, and the time for appeal expired on April 4, 1934.

* * * * * * *

QUESTIONS PRESENTED

I.

Whether the decision of the Board of Tax Appeals having become final and from which no appeal can be taken, are res adjudicata on the Bankruptcy Court.

II.

The jurisdiction of the Board and the Court being concurrent and no new issues being raised, can the Bankruptcy Court review the final decisions of the Board?"

* * * * * * *

Emphasis supplied by the Court because of the reservation concerning the foregoing statement in a brief of the Trustee wherein it is stated:

* * * * * * *

"The preliminary statement of facts on the question of jurisdiction as set forth in Claimant's Brief is in the main correct and comprehensive, and the two questions presented are not challenged by the Trustee except on one point. Claimant, in its statement of facts, and throughout its entire brief, use the terms 'sale' and 'profit from sale' in referring to the transfer of properties in question. This is absolutely contrary to the facts adduced in the evidence at the hearing, and puts an entirely wrong construction on the whole transaction. Trustee also objects to all extraneous matter touching upon the presentation of the question to the Board of Tax Appeals, as this is all incompetent, irrelevant and immaterial and improper in view of the evidence brought out at the hearing."

PETITIONER cites (including briefs before Referee): Revenue Act of 1926, Sections 1003 (a), 1005 (a), Revenue Act of 1932, Sections 274 (a), 1101; Revenue Act of 1924, Section 900 (a), Section 274 (b), Section 900 (g) Section 284 (d); Blair v. Curran, 24 Fed. (2d) 390; Blair v. Hendricks, 24 Fed. (2d) 819; Revenue Act of 1926, Sec. 1001 (a);

Revenue Act of 1928; The Greylock Mills v. Thomas W. White, Collector, 55 Fed. (2d) 704; American Woolen Company v. White, 56 Fed. (2d) 716; Old Colony Trust Company v. Commissioner, 279 U. S. 716, 49 S. Ct. 499; Bankers Reserve Life Company v. United States, 44 Fed. (2d) 1000; Camp v. United States, 44 Fed. (2d) 126; Bindley et al v. Heiner, 38 Fed. (2d) 489; Finance & Guaranty Company v. Commissioner, 50 Fed. (2d) 1061; Lucas, Commissioner of Internal Revenue v. Kansas City Structural Steel Company, 281 U. S. 264, 50 S. Ct. 263, 74 L. Ed. 848; Work v. Rives, 267 U. S. 175, 45 S. Ct. 252, 69 L. Ed. 561; Silberschein v. United States, 266 U. S. 221, 225, 45 S. Ct. 69, 69 L. Ed. 256; United States v. Atcheson, T. & S. F. Ry. Co., 249 U. S. 451, 39 S. Ct. 325, 63 L. Ed. 703; Ross v. Day, 232 U. S. 110, 34 S. Ct. 233, 58 L. Ed. 528; Williamsport Wire Rope Co. v. United States, 277 U. S. 551, 48 S. Ct. 587, 72 L. Ed. 985; National Fire Insurance Company v. United States, 52 Fed. (2d) 1011; James v. United States, 38 Fed. (2d) 140, certiorari denied, 51 S. Ct. 32; James et al v. United States, 38 Fed. (2d) 143, certiorari denied 51 S. Ct. 32; United Motors Corp. v. United States, 44 Fed. (2d) 407; Ohio Steel Foundry Co. v. United States, 38 Fed. (2d) 144; Green v. McLaughlin, Collector, 55 Fed. (2d) 423; Bankers Reserve Life Ins. Co. v. United States, 44 Fed. (2d) 1000, certiorari denied, 51 S. Ct. 485; National Life Insurance Company v. United States, 277 U. S. 508; Warren Mfg. Co. v. Tait, 60 Fed. (2d) 982; Moore

Ice Cream Co. v. Rose, 53 S. Ct. 620; Second National Bank of Saginaw, Trustee, v. Woodworth, 66 Fed. (2d) 170, affirming 54 Fed. (2d) 672; Blair, Commissioner v. Hendricks, 24 Fed. (2d) 819; Section 904, Revenue Act of 1926; Section 274 (a), Revenue Act of 1932; Section 274 (a), Revenue Act of 1928 and Section 282 (a), Revenue Act of 1926; Section 279 (b), Revenue Act of 1924; Plains Buying and Selling Association, 5 B.T.A. 1147; Cunningham, Dec. 6224, 20 B.T.A. 428; Hoffman et al., Dec. 2528, 7 B.T.A. 303; Tait, Collector v. Western Maryland Railway Company, 289 U. S. 620, 53 S. Ct. 706; Cromwell v. County of Sac., 94 U. S. 351; Mary Haller, 26 B.T.A. 395; Revenue Act of 1926, Sections 232, 233 (a), 213, 202 (a), 203 (a), 204 (a), 206 (a) and (b); Revenue Act of 1928, Sec. 117 (a) and (b); Eisner v. Macomber, 252 U. S. 189, 40 S. Ct. 189; Bowers v. Kerbaugh-Empire Company, 271 U. S. 170, 46 S. Ct. 449, affirming 300 Fed. 938; United States v. Kirby Lumber Company, 284 U. S. 1, 52 S. Ct. 4; Consolidated Gas of the City of Pittsburgh, 24 B.T.A. 901; Suncrest Lumber Company, 25 B.T.A. 375; Norfolk Southern Railroad Company, 25 B.T.A. 925; Terminal Warehouse Company v. Commissioner of Internal Revenue, No. 7046, decided April 12, 1934; Guy T. Helvering, Commissioner of Internal Revenue, v. American Chicle Company, S. Ct. No. 349, decided March 5, 1934, 343 CCH 9122; S. M. 3748 IV-2 C.B. 17; I. T. 1562, II-1, C.B. 33; Remington on Bankruptcy, Sec. 1740, page 507; Ratcliff v. Clendenin,

36 A.B.R. 561, 232 Fed. 61; Grandison v. National Bank of Rochester, 36 A.B.R. 438, 231 Fed. 800; Remington on Bankruptcy, Sections 1750, 1752, 1753; 29 B.T.A. 90.

TRUSTEE cites (including brief before Referee): Revenue Act of 1928, Sec. 274, Art. 1192; Section 64a of the Bankruptcy Act, as amended; Revenue Act 1932, Sec. 274 (a); Title 26, U.S.C.A., Sec. 1211; In re W. P. Williams Oil Co., 265 Fed. 401; In re Scheinman, 14 Fed. (2d) 323; In re Wenatchee Heights Orchard Assn., 212 Fed. 787; New Jersey v. Anderson, 27 Sup. Ct. 137; In re Brady Foundry Co., 3 Fed. (2d) 437; Commissioner of Internal Revenue v. Continental Oil Co., 68 Fed. (2d) 750; In re Anderson, 47 B. R. 64; New Jersey v. Anderson, 203 U. S. 483; In re W. P. Williams Oil Corporation, 265 Fed. 401; In re United Five & Ten Cent Store, Inc., 242 Fed. 1005; 12 N. S. 732; Revenue Act of 1926, Art. 49, Section 213, Regulations 69; Eisner v. Macomber, 252 U. S. 189, 40 S. Ct. 189; Kerbaugh-Empire Co. v. Bowers, Collector of Internal Revenue, 271 U. S. 170, 46 S. Ct. 449; The Dallas Transfer & Terminal Warehouse Co. v. Commissioner of Internal Revenue, U. S., C. C. A., 5th Circuit, Decided April 12, 1934, reversing B.T.A. 651.

Objecting creditor cites: Section 64a of the Bankruptcy Act as amended May 27, 1926; Title 11, U.S.

C.A., Sec. 104, sub-division a; Section 274 of the Revenue Act; In re Cosmopolitan Power Company, 137 Fed. 858-62; New Jersey v. Anderson, 203 U. S. Rep. 483, 27 Sup. Ct. 137; In re W. P. Williams Oil Co., 265 Fed. 401; In re Sheinman, 14 Fed. (2d) 323; Paul and Mertens, "Law of Federal Income Taxation", Vol. 5, p. 359, page 138; In re General Film Corp., 274 Fed. 903; In re Heffron Co., 216 Fed. 642; In re Anderson, 275 Fed. 397, affirmed 279 Fed. 525; In re United Five & Ten Cent Store, 242 Fed. 1005; In re Heller, Hirsch & Co., 258 Fed. 208; In re George F. Redman & Co., 17 Fed. (2d) 128; Commonwealth of Massachusetts v. Meehan, 67 Fed. (2d) 638-40; Regulations 77, "Income Tax", Revenue Act of 1932, Article 1191, p. 313; Kerbaugh-Empire Co. v. Bowers, Collector of Internal Revenue, 271 U. S. 170, 46 S. Ct. 449; Dallas Transfer & Terminal Warehouse Co. v. Commissioner of Internal Revenue, 70 Fed. (2d) 95; Coastwise Transportation Corporation, 71 Fed. (2d) 104; Commissioner v. Simmons Gin Company, 43 Fed. (2d) 327; Burnett v. Campbell Company, 50 Fed. (2d) 487.

CUSHMAN, District Judge:

Unless the Referee was authorized to re-examine and re-determine the questions decided by the Board of Tax Appeals there is no necessity to examine questions other than those stated by Claimant and already quoted.

Pertinent provisions of the law relating to the Board of Tax Appeals appear in Title 26, U.S.C.A., Sections 1211 to 1228, inclusive. Section 1224, as amended, provides for a review of decisions of the Board by the Circuit Courts of Appeal and the Court of Appeals of the District of Columbia, if petition is filed for review within three months after the decision is rendered.

Section 1228 provides:

"Sec. 1228. When Board's decision becomes final.

(a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the board has been affirmed or the petition for review dismissed by the circuit court of appeals and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the decision of the board has been affirmed or the petition for review dismissed by the Circuit court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the

decision of the board be affirmed or the petition for review dismissed.

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either the commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the board shall become final when so corrected.

(c) If the decision of the board is modified or reversed by the circuit court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the circuit court of appeals, shall become final on the expiration of thirty days from the time such decision of the board was rendered, unless within such thirty days either the commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the board shall become final when so corrected.

(d) If the Supreme Court orders a rehear-

ing; or if the case is remanded by the circuit court of appeals to the board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the decision of the board rendered upon such rehearing shall become final in the same manner as though no prior decision of the board had been rendered.

(e) As used in this section—

(1) The term 'circuit court of appeals' includes the Court of Appeals of the District of Columbia;

(2) The term 'mandate' in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate."

Section 3274 (a) of Title 26, U.S.C.A., 1934 Cumulative Annual Pocket Part, (Sec. 505, 48 Stat., 757), provides:

"Sec. 3274 BANKRUPTCY and RECEIVERSHIPS

(a) Immediate Assessment. Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the

District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the restrictions imposed by section 3272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. In such cases the trustee in bankruptcy or receiver shall give notice in writing to the Commissioner of the adjudication of bankruptcy or the appointment of the receiver, and the running of the statute of limitations on the making of assessments shall be suspended for the period from the date of adjudication in bankruptcy or the appointment of the receiver to a date 30 days after the date upon which the notice from the trustee or receiver is received by the Commissioner; but the suspension under this sentence shall in no case be for a period in excess of two years. *Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the board*

after the adjudication of bankruptcy or the appointment of the receiver."

(*Emphasis* supplied by the Court)

The parties concede that a review of the Board's determination might have been secured despite the fact of the adjudication in bankruptcy following the Board's determination.

The determination of the question presented depends upon the interpretation of the emphasized part of the last quoted section of the law and particularly the following words therein "despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board", for the implication is that in the absence of such "pendency" such claims are not to be presented to the bankruptcy court for other than allowance as determined by the Board of Tax Appeals or on review of such determination as provided by Sections 1224 et seq., except to the extent that there be included therein a penalty.

The controlling question then becomes "What do the words of the above statute 'pendency of proceedings' mean?" Unless there is such "pendency" until the time that the Board's decision becomes final, as provided by Section 1228, above quoted, it can not be contended that the Referee had jurisdiction to consider and determine the validity of the tax.

At common law and under numerous statutes it may be conceded that an action or suit is pending until such time as there is disposition of the appeal.

Mackenzie v. Engelhard Co., 266 U. S. 131-142; Montoya v. Gonzales, 232 U. S. 375; Ex Parte Craig, 274 Fed. 177-187; Moore v. Douglas, 230 Fed. 399; State v. Tugwell, 19 Wash. 238; Haynes v. Seattle, 87 Wash. 375.

It does not follow, however, that in the present statute such was the intent of Congress. Congress provided, by Section 1224, that review of the Board's decisions should be by courts comprised of more than one Judge.

It is the duty of the Court to construe, if possible, sections of a statute so that they are consistent. To reach the conclusion that a deficiency determined by the Board of Tax Appeals may be re-examined and re-decided by the Judge of a District Court or a Referee in Bankruptcy is, on its face, inconsistent with the intent and purpose on the part of Congress shown that a review of the Board's decision should be by such an appellate court.

It follows that within the meaning of Section 3274 (a) there is no "pendency" of proceedings after the Board has made its Order following its decision.

The action of the Referee in this matter is disaffirmed.

Any order or orders based on the ruling herein will be settled upon notice and may be presented and noted for hearing Monday, May 6th, 1935 at 10:00 o'clock in the forenoon.

The Clerk is directed to notify the attorneys for the parties of this decision.

United States of America,
Western District of Washington.—ss.

CERTIFIED COPY

I, Edgar M. Lakin, Clerk of the United States District Court in and for the Western District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Memorandum Decision Upon Referee's Order in Cause No. 33183—In re Carlisle Packing Company, a corporation now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Seattle this 24th day of January, A. D. 1936.

[Seal] EDGAR M. LAKIN,
Clerk.
By F. W. MOSES,
Deputy Clerk.

[Endorsed]: Filed January 28, 1936. U. S. C. C. A. Paul P. O'Brien, Clerk.

No. 7942

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. P. KELLY, Trustee in Bankruptcy for the Carlisle Packing Company, a Corporation, Bankrupt,

Appellant,

vs.

U. S. A. and The Collector of I. R. for the U. S. A., and The Collector of I. R. for the Collection Dist. of Washington,

Appellees.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Wednesday, February 19, 1936.

Before: WILBUR, MATHEWS and HANEY, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION.

Ordered appeal in above cause argued by Mr. Wickliffe B. Stratton, counsel for appellant, and by Mr. Frank J. Ready, Jr., Special Assistant to the Attorney General, counsel for appellees, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, May 5, 1936.

Before: WILBUR, DENMAN and HANEY, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF DECREE.

By direction of the court, Ordered that the opinion and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Before WILBUR, MATHEWS and HANEY, Circuit Judges.

MATHEWS, Circuit Judge:

This appeal is from a judgment allowing appellee's claim of $20,515.52, with interest, against the estate of Carlisle Packing Company, a corporation, bankrupt. The appeal is taken under §25(a) of the Bankruptcy Act, as amended, 11 USCA §48(a), which provides:

> "Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States . . . in the following cases: . . . (3) From a judgment allowing or rejecting a claim of $500 or over. . . ."

The assignments of error raise questions the consideration of which would require an examination of the evidence. The evidence was not brought into the record and is not before us. General Order in Bankruptcy No. 36, as amended, 288 U. S. 632, 11 USCA §53 provides:

> "Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in equity in courts of the United States."

Equity Rule 75(b), as amended, 286 U. S. 570, 28 USCA §723, provides:

> "The evidence to be included in the record . . . shall be stated in simple and condensed form . . . The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office . . . at or before the time of filing his praecipe . . . He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement . . . At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal."

Equity Rule 77, 226 U. S. 672, 28 USCA §723, provides:

> "When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and

> evidence, the parties, with the approval of the district court of the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal."

Appellant has not complied with either of these rules, but has disregarded them both. There is no statement of the evidence, nor is there any agreed statement of the case. In the absence of any such statement, we indulge the presumption that the evidence supports the judgment and warrants its affirmance. Oriole Phonograph Co. v. Kansas City Fabric Products Co. (C. C. A. 8), 34 F.(2d) 400, 401; Interstate Folding Box Co. v. Empire Box Corp. (C. C. A. 7), 68 F.(2d) 500. See, also, Title & Trust Co. v. Wernich (C. C. A. 9), 68 F.(2d) 811, 812, 814.

Judgment affirmed.

HANEY, Circuit Judge, Dissenting:

I dissent.

In the consideration of causes on appeal I think a decision upon the merits is desirable, where possible, and that it should be made, upon questions submitted by the parties.

The record before us contains a statement of evidence treated by both of the parties as true and correct. Its form appears to be sufficient, its veracity is questioned by neither party, it undoubtedly is improperly authenticated.

This being a proceeding in bankruptcy, the Equity Rules promulgated by the Supreme Court are applicable, and the power of the trial court to approve the statement of evidence is not limited by the expiration of the term at which the order was entered. Struett v. Hill (C. C. A. 9) 269 F. 247; Barber Asphalt Co. v. Standard Co. 275 U. S. 372, 385.

Pursuant to the provisions of Equity Rule seventy six, this Court should direct the trial court to correct the omission in certification with respect to the statement of evidence by a supplemental transcript.

[Endorsed]: Filed May 5, 1936.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7942.

S. P. KELLY, Trustee in Bankruptcy for the Carlisle Packing Company, a Corporation, Bankrupt,

Appellant,

vs.

U. S. A. and The Collector of I. R. for the U. S. A., and The Collector of I. R. for the Collection Dist. of Washington,

Appellees.

DECREE.

APPEAL from the District Court of the United States for the Western District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: Filed and entered, May 5, 1936.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, June 29, 1936.

Before: GARRECHT, DENMAN and MATHEWS, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION, AND DENYING PETITION FOR REHEARING.

By direction of the court, Ordered that the opinion and dissenting opinion of Haney, Circuit Judge, on petition of appellant for a rehearing be forthwith filed by the clerk.

Pursuant thereto, it is Ordered—Haney, Circuit Judge dissenting—that the petition of appellant, filed June 1, 1936, for a rehearing of above cause, be, and hereby is denied.

[Title of Court and Cause.]

ON PETITION FOR REHEARING.

Before: WILBUR, MATHEWS and HANEY, Circuit Judges.

MATHEWS, Circuit Judge:

Appellant's petition for rehearing states that this Court erred in failing to review the question presented and raised by appellant's specifications of error numbered I, II and III; that this was the

only question passed on by the District Court; and that the consideration thereof would not require an examination of the evidence. These specifications are as follows:

> "I. The Court erred in holding that a decision of the Board of Tax Appeals is res adjudicata and binding upon the bankruptcy court, the said decision of the Board of Tax Appeals not having become final before the adjudication in bankruptcy.
>
> "II. The Court erred in not holding that the Bankruptcy Court can review the final decision of the Board of Tax Appeals.
>
> "III. The Court erred in disaffirming the order of the Special Referee and in not affirming the same for the reason that the claim of the United States Government disallowed by the said order of the said Special Referee is for taxes claimed to be due to the United States and questions arising as to the amount or legality of any such taxes are properly heard and determined by the Court in Bankruptcy, and the Court in Bankruptcy has jurisdiction of all such questions, regardless of the ruling thereon by the Board of Tax Appeals."

The question which these specifications attempts to raise is whether the decision of the Board of Tax Appeals therein referred to was binding and conclusive on the District Court. No such question is presented by the record. The record does not indicate that appellee's claim was founded on any deci-

sion of the Board of Tax Appeals, or that it had been the subject of any such decision, or that any such decision was pleaded, proved or otherwise brought to the attention of the District Court, or that the District Court considered or determined the effect of any such decision. The judgment appealed from reads as follows:

> "The above matter having come on before the Court upon the petition of the United States for review of the order of the Special Referee dated December 31, 1934, denying the claim filed by the Collector of Internal Revenue for the Collection District of Washington, acting for the United States Government, for $20,515.52 plus interest at 6% per annum from January 12, 1934, to date paid, on account of income tax liabilities because of asserted deficiencies for the fiscal years ended November 30, 1927, November 30, 1928, and November 30, 1929, and the Court on April 22, 1935, having filed his written memorandum decision upon the review of the Special Referee's order, and this matter, upon written notice to the parties, having been noted for hearing this 6th day of May, 1935, it is hereby
>
> "Ordered, adjudged and decreed that the Special Referee's said order be and is hereby disaffirmed, and that the said claim of the United States Government be, and is hereby allowed as a priority claim as provided by Section 3466 R. S. and Section 64(a) of the Bankruptcy Act, as amended, against the estate

of the Carlisle Packing Company, a corporation, bankrupt, in the sum of $20,515.52, plus interest from January 12, 1934, at the rate of 6% per annum until paid, and that the said claim be paid."

There is no reference to any decision of the Board of Tax Appeals. References to and a purported copy of such a decision are found in a so-called abstract of record of proceedings had before the referee, filed here as a part of the transcript, but this so-called abstract is not certified by the referee or otherwise authenticated and is no part of the record on appeal. We do not and cannot know that the proceedings described in the abstract actually occurred. Whether the hearing before the District Court was on evidence taken by the referee and by him certified to the District Court, or on independent evidence taken by the District Court, cannot be ascertained from the record. As stated in our former opinion, the evidence on which the District Court acted was not brought into the record and is not before us.

Further references to a decision of the Board of Tax Appeals are found in the District Court's memorandum opinion, which, though not included in the transcript as originally filed, was, by stipulation of the parties, printed as a part thereof. It is, however, well settled that the trial court's opinion is no part of the record on appeal. Mutual Reserve Fund Life Assn. v. Du Bois (C. C. A. 9), 85 F. 586, 589.

Appellant suggests that, if a statement of the evidence is deemed necessary, the record should be re-

turned to the District Court for the settlement and authentication of such a statement, citing in support of his suggestion Barber Asphalt Paving Co v. Standard Asphalt & Rubber Co., 275 U. S. 372. In that case, the transcript contained a statement of the evidence, properly authenticated (275 U. S. 378), but the evidence was not condensed and put in narrative form, as required by Equity Rule 75. The Supreme Court directed that the transcript be remitted to the District Court, in order that these formal defects in the statement might be corrected. Here there is no statement nor anything purporting to be a statement of the evidence. There is, therefore, nothing to be corrected.

Petition denied.

HANEY, Circuit Judge, dissenting:

In the majority opinion, reference is made to the abstract of record of proceedings had before the referee, and it is said

> "We do not and cannot know that the proceedings described in the abstract actually occurred."

Both parties in the briefs have made arguments based on the transcript which includes the abstract specified. Neither party raised the point on which the opinion was based. The point took its origin from the bench without suggestion from or reference to either party and in the face of extended argument and voluminous briefs based upon the statement of evidence contained in the abstract.

In Sommer v. Rotary Lift Co. (C. C. A. 9), 66 F.(2d) 809, in an equity appeal there was no state-

ment of evidence whatever, yet the court ordered the submission to be vacated, and a supplemental transcript to be filed containing a statement of the evidence. I think that we might well follow Sommer v. Rotary Lift Co., supra, and thereby avoid a diversity of decisions even in our own circuit.

I adhere to my former opinion, that the omission of authentication should be corrected, and therefore dissent from the majority opinion denying the petition for rehearing.

[Endorsed]: Opinion and Dissenting Opinion on Petition for Rehearing. Filed June 29, 1936. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. Stratton, Leader, Little and Stratton, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including September 1, 1936; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT
United States Circuit Judge.

Dated: San Francisco, California, August 7, 1936.

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred sixty-eight (168) pages, numbered from and including 1 to and including 168, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 12th day of Aug. A. D. 1936.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. 309

IN THE

Supreme Court of the United States

(OCTOBER TERM, 1936)

S. P. KELLY, Trustee in Bankruptcy for the Carlisle Packing Company, a Corporation, Bankrupt,

Petitioner,

VS.

UNITED STATES OF AMERICA, and the COLLECTOR OF INTERNAL REVENUE for the United States of America, and the COLLECTOR OF INTERNAL REVENUE for the Collection District of Washington,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION AND SUPPORTING BRIEF

W. B. STRATTON,
RALPH O. OLSON,
GEORGE V. WHITTLE, C. P. A.,
Counsel for Petitioner.

710 Smith Tower,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

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IN THE

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(OCTOBER TERM, 1936)

S. P. KELLY, Trustee in Bankruptcy for the Carlisle Packing Company, a Corporation, Bankrupt, *Petitioner*, vs. UNITED STATES OF AMERICA, and the COLLECTOR OF INTERNAL REVENUE for the United States of America, and the COLLECTOR OF INTERNAL REVENUE for the Collection District of Washington, *Respondents.*	No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, S. P. KELLY, Trustee in bankruptcy for the Carlisle Packing Company, a corporation, bankrupt, prays that a Writ of Certiorari issue to review a final decree of the Circuit Court of Appeals for the Ninth Circuit, entered in the above cause June

29, 1936 (R. /63) affirming a decree of the United States District Court for the Western District of Washington, Northern Division, and respectfully shows:

That the opinions of the Circuit Court of Appeals (R. /58) are reported in 83 Fed. (2d) 783, and on re-hearing (R. /63).

In the District Court (R. /38) reported in 12 Fed. Supp. 11, and decree was entered accordingly (R. 114).

JURISDICTION

That the jurisdiction of this court is invoked under section 240a of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936) and (U. S. Code, Title 28, Sec. 347). Bankruptcy Act, Sec. 24a and 25 (U. S. Code, Title 11, Secs. 47a and 48).

First: The decision in this case is in conflict with decisions of this Court and decisions of Circuit Courts of Appeal, or the decision herein raises a new and important public question:

Whether the United States Government's Claim filed in the bankruptcy court for income taxes based on the decision of the Board of Tax Appeals is within the jurisdiction of the bankruptcy court to determine the amount and legality thereof; or is the decision of the Board of Tax Appeals *res adjudicata* on the question of the amount and legality of the tax and binding on the bankruptcy court?

Second: The decision in this case, on a question of practice, is in conflict with the decisions of this Court and decisions of Circuit Courts of Appeals:

Whether, when the record on appeal contains a pur-

ported statement of evidence treated by both the appellant and respondent as true and correct, and its form is considered to be sufficient and its veracity is unquestioned by either party, and both parties filed briefs and made oral arguments based on such statement, but which statement is not authenticated by a certificate of the United States District Judge, as required by Equity Rule 75(b), should the Circuit Court of Appeals vacate the setting and direct or permit the appellant to comply with the rule and secure from the trial court a proper certificate of authentication?

REASONS FOR GRANTING THE PETITION

1. This cause involves a question of great public importance touching the jurisdiction of the United States District Court sitting in bankruptcy to pass upon the amount and legality of a claim of the United States for income taxes, in cases where the tax had been determined by a decision of the Board of Tax Appeals made prior to the time the taxpayer was adjudicated a bankrupt.

As to this question, the case of *New Jersey v. Anderson*, 203 U. S. 483, the Supreme Court of the United States decided that the bankruptcy court had jurisdiction to re-assess or liquidate a tax; and to the same effect are the cases of: *In re E. C. Fisher Corp.*, 229 Fed. 316; *In re P. W. Williams Oil Company*, 265 Fed. 401; *In re Sheinman*, 14 Fed. (2d) 323; and, *In re George F. Redman & Co. Inc.*, 17 Fed. (2d) 128.

Either the decision of the Circuit Court of Appeals

for the Ninth Circuit in the instant case affirming the decision of the District Court for the Western District of Washington, runs counter to the above decisions and there is a conflict in regard thereto.

2. Or this decision in the instant case raises a new and important public question for that the decision of the Board of Tax Appeals becomes and is *res adjudicata* fixing the amount and legality of the income tax due from the bankrupt, and a claim for income taxes filed in the bankruptcy court based on the Board's decision cannot be decided and is beyond the jurisdiction of the bankruptcy court.

It is then a test case upon the decision of which the jurisdiction of the United States District Court sitting in bankruptcy to determine the amount and legality of the United States Government's Claims for income taxes will depend.

The Trustee objected to the allowance and payment of the claim for income taxes. The referee entertained jurisdiction, heard proof in regard to the claim for income taxes, and disallowed the same. The respondent filed its petition for revision and the referee certified the record to the U. S. District Judge and upon hearing had, the District Judge decided that the bankruptcy court was without jurisdiction to hear and determine the amount of this claim for income taxes based on a decision of the Board of Tax Appeals and ruled that the decision of such Tax Board was *res judicata* as to the bankruptcy court and reversed the decision of the referee.

The bankruptcy court, thus held that it was without jurisdiction to determine the amount and legality

of the claim for income taxes and ordered the claimed income tax paid in the sum of $20,515.52, plus interest. The Circuit Court of Appeals for the Ninth Circuit, without a decision on the merits, affirmed the District Court.

The question in issue is of great public importance. Many cases involving large sums of money and presenting the same issue are now pending and will arise in various United States Courts throughout the country. A review of the question by this Court will set at rest much doubt, avoid multiplicity of suits and promote the orderly administration and settlement of bankrupt estates.

As to the second question, pertaining to the question of practice, on appeal to the Circuit Court of Appeals for the Ninth Circuit, that court of its own motion and on a record that both relator and respondent treated as true and correct, found that there was not a compliance with Equity Rule 75(b) by reason of the failure to have the trial judge certify the statement of evidence, and, refusing a decision on the merits, affirmed the District Court.

On petition for re-hearing, appellant asked for permission to comply with the rule and that the transcript be remitted to the District Court for a certificate of authentication and be re-filed as a supplemental transcript on appeal.

Even in the Ninth Circuit Court of Appeals there is a serious conflict of decision on this question of practice. That Court in the case of *Sommer v. Rotary Lift Co.* (CCA 3) 66 Fed. (2d) 809, which presented the same question as to the proper authentication of

the record, vacated the setting on failure to comply with Equity Rule 75(b) and ordered the appellant to comply with the rule with respect to the statement of evidence. Again, a decision of the United States Supreme Court in the case of *Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co.*, 275 U. S. 372, held that to affirm a decree because Equity Rule 75(b) was transgressed was a very severe penalty to impose; and that the Circuit Court of Appeals, Seventh Circuit, should have remitted the transcript to the District Court so that opportunity might be had to comply with the rule.

A very severe penalty was imposed by the decision of the Circuit Court of Appeals, Ninth Circuit, for failure to conform to the rule that had been violated by mere inadvertence; that no opportunity was given to comply, although on a motion for re-hearing relator offered to comply; that no objection had been made for a failure to comply and the court of its own motion, instead of requiring compliance with the rule, penalized relator for such failure by affirming the lower court.

Petitioner believes that previous decisions are sound and that the bankruptcy court has plenary power to hear and determine claims in bankruptcy proceedings for income taxes under Sec. 64(a) of the Bankruptcy Act (11 U. S. C. Sec. 104a).

Wherefore, your petitioner contends that by reason of the decision in the case at bar, and the other decisions herein cited, there is a diversity of opinion, and not a uniform administration of the Bankruptcy Act as to the important questions herein presented.

Your petitioner appends hereto his brief in support of this petition.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this court the record in the case therein entitled "*S. P. Kelly, Trustee in Bankruptcy for the Carlisle Packing Company, a Corporation, Bankrupt, Appellant, v. United States of America, and the Collector of Internal Revenue for the United States of America, and the Collector of Internal Revenue for the Collection District of Washington, Appellees, No. 7942,*" to the end that said case may be reviewed and determined by this court, as provided by law; and that the judgment of said Circuit Court of Appeals may be reversed and that the amount and legality of the United States Government's Claim for income taxes may be determined by the bankruptcy court.

W. B. STRATTON,
RALPH O. OLSON,
GEORGE V. WHITTLE, C. P. A.,
Counsel for Petitioner.

710 Smith Tower,
Seattle, Washington.

UNITED STATES OF AMERICA,
DISTRICT OF WASHINGTON,
COUNTY OF KING. } ss.

W. B. STRATTON being duly sworn on oath, says: That he is counsel for S. P. KELLY, Trustee in Bankruptcy, the Petitioner above named, and as such he has authority to make this verification; that said trustee is not present or available to make this affidavit; that affiant has read the foregoing petition, knows the contents thereof, and that the facts stated therein are true, to the best of his knowledge, information and belief.

W. B. STRATTON.

SUBSCRIBED and SWORN to before me this 8th day of August, 1936.

ENA HALL,
Notary Public in and for the State of Washington, residing at Seattle.

NOTARIAL SEAL.

I HEREBY CERTIFY that I have examined the foregoing petition, know the contents thereof, and it is my opinion the same is well founded and that the case is one in which the prayer of the petitioner should be granted by this Court, and that said petition is not presented for purposes of delay.

W. B. STRATTON,
Of Counsel for Petitioner.

No.....

IN THE

Supreme Court of the United States

(OCTOBER TERM, 1936)

S. P. KELLY, Trustee in Bankruptcy for the Carlisle Packing Company, a Corporation, Bankrupt,

Petitioner,

VS.

UNITED STATES OF AMERICA, and the COLLECTOR OF INTERNAL REVENUE for the United States of America, and the COLLECTOR OF INTERNAL REVENUE for the Collection District of Washington,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

W. B. STRATTON,
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GEORGE V. WHITTLE, C. P. A.,
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No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

This is an application for a Writ of Certiorari for a review of the decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the United States District Court for the Western District of Washington.

Material facts and the questions involved are set

forth in the foregoing petition. The question for decision is whether the United States Government's claim filed in the bankruptcy court for income taxes based on the decision of the Board of Tax Appeals is within the jurisdiction of the bankruptcy court to determine the amount and legality thereof; or is the decison of the Board of Tax Appeals *res judicata* on the amount and legality of the tax and binding on the bankruptcy court?

The contention of the petitioner is that the bankruptcy court is clothed with plenary authority to hear and determine claims in bankruptcy proceedings for taxes due; that when objection is made to the payment of a claim for income taxes, even though the claim is based upon a decision of the Board of Tax Appeals, the bankruptcy court is clothed with jurisdiction to determine the amount and legality of such income tax.

First Point

The Circuit Court of Appeals for the Ninth Circuit, erroneously decided that the bankruptcy court was without jurisdiction to hear and determine the amount and legality of a claim for income taxes, not justified by the facts and contrary to the decisions of this court and contrary to the rulings of other Circuits and contrary to the weight of the authorities.

Second Point

The Circuit Court of Appeals erroneously affirmed the decision of the District Court as a penalty for failure to comply with Equity Rule 75(b).

ARGUMENT—FIRST POINT

The jurisdiction of the U. S. District Court to pass upon a claim for taxes rests upon Sec. 64a of the Bankruptcy Act, as follows:

> "Sec. 64a. The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, in the order or priority as set forth in paragraph (b) hereof; PROVIDED, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustees shall be credited with the amounts thereof, *and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.*" (Italics ours)
>
> U. S. Code, Title 11, Sec. 104a.

On appeal filed with the U. S. Board of Tax Appeals by the Carlisle Packing Company, opinion was rendered (R. 10) and orders of deficiency entered January 4, 1934 (R. 16), upon which the Commissioner of Internal Revenue made his summary assessment in the total amount of $20,515.52 (R. 23).

Thereafter, and while the right of appeal from the decision of the Board of Tax Appeals still existed, the Carlisle Packing Company was on the 9th day of February, 1934, on involuntary petition adjudicated a bankrupt (R. 2). Thereafter, and on the 1st day of June, 1934, a statement of claim for income taxes

due the United States was filed in the bankruptcy proceedings (R. 3); and the trustee in bankruptcy objected to such claim for income taxes (R. 6); and the referee, over the Government's objections, proceeded to determine the amount and legality of the tax (R. 7), and rendered its decision disallowing such claim for income taxes (R. 90). The Government filed its petition for revision of such decision by the United States District Judge (R. 107).

The District Judge rendered his written opinion holding that the decision of the Board of Tax Appeals became *res judicata* and binding upon the bankruptcy Court, and that for such reason the bankruptcy court was without jurisdicton to determine the amount and legality of the tax.

The decision of the bankruptcy court that it was without jurisdiction to determine the amount and legality of income taxes in the sum of $20,515.52, because the questions pertaining thereto had been decided by the Board of Tax Appeals, was affirmed by the Circuit Court of Appeals for the Ninth Circuit.

We respectfully submit that the decision of the Circuit Court of Appeals for the Ninth Circuit, affirming the decision of the District Court for the Western District of Washington, is in conflict with the decisions of this Court and with the decisions of other Circuit Courts of Appeals.

In construing Sec. 64(a) of the Bankruptcy Act, this Court declared:

"The Section (64a) itself declares that in case

of disputes as to the amount or legality of any such tax, they shall be heard and determined by the Court. The State Court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a federal statute, giving preference to tax, is a federal question, of ultimate decision in this Court. * * *"

And again:

"But be that as it may, Section 64(a) specifically provides that in any case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the Court, with a view to ascertaining the amount really due. We do not think it was the intention of Congress to conclude the Bankruptcy Courts by the findings of Boards of this character, and that the claim should have been upon the basis of the capital stock actually outstanding."

New Jersey v. Anderson, 203 U. S. 483.

Decisions of the Circuit Courts of Appeals and District Courts in conflict with the instant case, are as follows:

In re Williams Oil Corp. (D. C.) 265 Fed. 401;

In re General Film Corp. (C. C. A. 2) 274 Fed. 903;

In re Heffron Co. (D. C.) 216 Fed. 642;

In re Anderson (D. C.) 275 Fed. 397 aff'd (C. C. A. 2), 279 Fed. 525;

In re United Five and Ten Cent Store (D. C.) 242 Fed. 1005;

In re Heller, Hirsh & Co. (C. C. A. 2) 258 Fed. 208;

In re Sheinman (D. C.) 14 Fed. (2d) 323;

In re George F. Redmond & Co. (D. C.) 17 Fed. (2d) 128;

Commonwealth of Massachusetts v. Meehan (C. C. A. 1) 67 Fed. (2d) 638.

Departmental regulations issued by the United States Treasury are in conflict with the decision in the instant case, but in conformity with the decisions of this Court and the several courts above cited; and further confusion and multiplicty of suits will arise if the decision in the instant case is not reviewed by this Court.

> "Bankruptcy Courts have complete jurisdiction under Section 64(a) of the National Bankruptcy Act to determine all disputes regarding the amount and validity of the taxes of a bankrupt."
>
> Regulations 77 "Income Tax," Revenue Act of 1932, Article 1191, p. 313.

ARGUMENT

Second Point

The Circuit Court of Appeals erroneously affirmed the decision of the District Court as a penalty for failure to comply with Equity Rule 75(b).

Equity Rule 75(b), by general order in bankruptcy No. 36, regulates the manner of preparing and certifying the statement of the evidence on appeal from the bankruptcy court. Relator inadvertently failed to comply with this rule, and the statement of evidence was not authenticated by a certificate of the District Judge.

The record on appeal contained a purported statement of evidence treated by both the appellant and respondent as true and correct, and its form was considered to be sufficient and its veracity was unquestioned by either party and both relator and respondent filed briefs and made oral arguments based on such statement. However, the statement was not authenticated by a certificate of the Court or District Judge as required by Equity Rule 75(b).

The cause having been submitted on written briefs and oral arguments without objection from either party, a divided court of its own motion decided that no statement of evidence was before it, and without a decision on the merits, affirmed the court below. One of the Judges, Hon. Bert Emory Haney, wrote a dissenting opinion holding that a decision upon the merits was desirable where possible, and that the court should remit the record with direction to sup-

ply the certificate of authentication by a supplemental transcript.

Thereupon relator petitioned for re-hearing, and asked that the Circuit Court of Appeals for the Ninth Circuit vacate the setting and remit the record to the District Court for proper authentication, and on denying the petition there was again a divided Court. Two of the Judges on written opinion denied the petition for he-hearing. One of the Judges, Hon. Bert Emory Haney, again wrote a dissenting opinion following a former decision of that court.

No question was raised on the sufficiency of the record by either party; and both parties submitted voluminous briefs and made oral argument on the record before the Court assuming the same to be properly authenticated.

As pointed out in the dissenting opinion,

> "The point took its origin from the bench without suggestion from or reference to either party and in the face of extended argument and voluminous briefs based upon the statement of evidence contained in the abstract."

The decision of the Circuit Court of Appeals, Ninth Circuit, in the instant case is in conflict, on a question of practice, with decisions of this Court and of the Circuit Courts of Appeals. In the instant case the Court did not require a compliance with Equity Rule 75(b); it exacted a very severe penalty for failure to comply, by affirming the decision of the Bankruptcy Court. In the case of *Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co.*, 275

U. S. 372, the Supreme Court of the United States held that the Court of Appeals passed the bounds of a sound discretion in affirming the decree, and that the transcript should have been remitted to the District Court for opportunity to comply with the Equity Rule. In *Sommer v. Rotary Lift Co.* (C. C. A. 9) 66 Fed. (2d) 809, in an equity appeal there was no statement of evidence whatever, yet the court ordered the submission to be vacated and a supplemental transcript containing a statement of the evidence. This decision was pointed out in the dissenting opinion in the instant case as being in conflict with the decision rendered by the majority of the court.

In the instant case the court went farther than deciding that the rule must be complied with, and exacted a severe penalty by affirming the decision in the bankruptcy court.

Respectfully submitted,

W. B. STRATTON,

RALPH O. OLSON,

GEORGE V. WHITTLE, C. P. A.,

Counsel for Petitioner.

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No. 309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

S. P. KELLY, Trustee in Bankruptcy for the Carlisle Packing Company, a Corporation, Bankrupt,

Petitioner,

vs.

UNITED STATES OF AMERICA, and the Collector of Internal Revenue for the United States of America, and the Collector of Internal Revenue for the Collection District of Washington,

Respondents.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

Board of Tax Appeals, Opinion (R. 10), is reported in 29 B. T. A. 514.

Special Referee in Bankruptcy, Opinion (R. 90), is not reported.

District Court, Western District, Washington, Opinion (R. 138) is reported in 12 Fed. Supp. 11.

Circuit Court of Appeals, Opinion (R. 158), is reported in 83 Fed. (2d) 783. Opinion on the petition for re-hearing (R. 163), is not reported.

JURISDICTION

The decree of the Circuit Court of Appeals affirming the decision of the District Court was entered on May 5, 1936 (R. 162). Petition for re-hearing was filed June 1, 1936, and order denying same was entered June 29, 1936 (R. 163). The petition for a writ of certiorari was filed on August 24, 1936, and petition granted and writ issued on October 12, 1936. That the jurisdiction of this court is invoked under section 240a of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936) and (U. S. Code, Title 28, Sec. 347). Bankruptcy Act, Sec. 24a and 25 (U. S. Code, Title 11, Secs. 47a and 48).

STATEMENT

Writ of Certiorari was issued by this Court on October 12, 1936, bringing before the Court the decision and decree of June 29, 1936, of the Circuit Court of Appeals for the Ninth Circuit, Hon. Wilbur, Matthews, and Haney Judges thereof, affirming the decision and decree of the United States District Court for the Western District of Washington, of Hon. Edward E. Cushman, Judge thereof, disaffirming the decision of the Special Referee in Bankruptcy, Hon. Tim Healy, and allowing the claim for income taxes of the United States Government.

The substantial and material facts are as follows:

On the 9th day of February, 1934, upon an involuntary petition filed on the 19th day of January, 1934, in the District Court of the United States for the Western District of Washington, Northern Division, an order of adjudication in bankruptcy was

made and filed (R. 2). In this bankruptcy proceeding there was filed on the first day of June, 1934, a statement of claim for taxes due the United States in the sum of $20,515.52, plus interest (R. 3). To this claim for taxes the trustee in bankruptcy in said cause, S. P. Kelly, the petitioner here, filed objections and requested that the claim be rejected (R. 6). These objections came on for hearing before Hon. Tim Healy, special referee in bankruptcy, at Bellingham, Washington (R. 7). The decision of the special referee was rendered December 31st, 1934, disallowing in full the government's claim for taxes (R. 90- 102).

Exceptions to the decision and order disallowing the claim for taxes were duly taken and the petition of the claimant, the United States, for review thereon was filed on the 7th day of January, 1935, with the Clerk of said United States District Court (R. 105-112).

An abstract of the record of the proceedings had before the special referee was brought before said United States District Court, Hon. Edward E. Cushman (R. 7-89), and the order reversing the special referee and allowing the claim for taxes was made, as aforesaid, from which an appeal was taken to the Circuit Court of Appeals, Ninth Circuit (R. 114).

From the abstract of the proceeding had before the special referee, above referred to (R. 7) it appears that the bankrupt, Carlisle Packing Company, is a corporation organized and existing under the laws of the State of Washington, and from the year 1902 had been engaged in the business of salmon fishing and packing, with plants in both Alaska and the State

of Washington. The company had been successfully operated up to and including the year 1919. Thereafter, and for the next five years the petitioner suffered heavy operating losses.

In order to carry on, it started in 1920 to borrow various sums from the Bank of California, National Association (Seattle Branch), and by February 15th, 1927, its indebtedness to that institution was in excess of $1,250,000, evidenced by promissory notes made by petitioner and its President, and sole stockholder, Frank Wright.

Early in 1927 the Bank of California advised Frank Wright, President of the Carlisle Packing Company, that the bank would not finance petitioner during the coming fishing season and demanded that petitioner liquidate its indebtedness to the bank (R. 26). After some negotiations petitioner agreed to and did transfer and convey to the Bank of California its canneries at Cordova and Bristol Bay, Alaska, together with certain equipment, boats, docks, land, etc., all of which is set forth and described in an instrument of transfer which was introduced in evidence (Trustee's Exhibit C., R. 25-57). All of the property was taken over by the Bank of California, for which it agreed to cancel and did cancel $650,000 of petitioner's indebtedness by the cancellation of promissory notes to that amount. This transaction was consummated on February 15th, 1927 (R. 27).

Thereafter the Collector of Internal Revenue for the Collection District of Washington determined the taxable net income for the fiscal years ending November 30th, 1927, 1928 and 1929, and proposed defici-

encies in taxes for those years of the Carlisle Packing Company, and appeals therefrom were filed with the U. S. Board of Tax Appeals by the Carlisle Packing Company in April, 1931, and in April, 1932. Hearings thereon were consolidated before the Board and were heard on September 15th, 1933.

On December 6th, 1933, the Board promulgated its opinion and entered same on January 4th, 1934, wherein it was held that the petitioner realized a taxable profit on the transaction with the Bank of California (R. 10-13).

Thereafter, and on January 12th, 1934, the Commissioner of Internal Revenue made his telegraphic summary assessment (R. 23).

Thereafter, and while the right of appeal from the Board of Tax Appeals still existed, the Carlisle Packing Company was on the 9th day of February, 1934, on involuntary petition adjudicated a bankrupt (R. 2).

The final determination of the Board did not become effective until April 4th, 1934, and under the Revenue Act applicable there to the pendency of a proceeding was in existence at the time of the adjudication.

The taxes for the years 1928 and 1929 are solely based upon the alleged profit from the transaction with the Bank of California in the year 1927, and if there were no such profit on the transaction, then the net loss of 1927 would be allowed under the Revenue Acts to be carried forward to the year 1928 and 1929, thus eliminating any taxable income in those years.

SPECIFICATIONS OF ERROR

Specification of Error No. I.

The Court erred in failing to direct the trial court to correct the omission in the certification with respect to the statement of evidence, by supplemental transcript.

Specification of Error No. II.

The Court erred in refusing to permit and direct the Petitioner to have the trial court correct the omission in certification with respect to the statement of evidence, by supplemental transcript, and to direct that the same be filed in the Circuit Court of Appeals, and to rehear the matter on such properly authenticated record upon the merits of the questions submitted by the parties.

Specification of Error No. III.

The Court erred in indulging the presumption that the evidence supported the judgment and warranted its affirmance, when the merits of the questions were submitted by both parties, and when the record before the Court contained a statement of evidence treated by both of the parties as true and correct.

Specification of Error No. IV.

The Court erred in affirming the decision of the District Court by indulging the presumption that the evidence supports the judgment, and accepting the record as not containing a statement of the evidence, there being no objection to the record on the ground that it was not properly authenticated, both parties having treated the record as containing a statement of the evidence as true and correct, and such state-

ment of evidence being sufficient as to form, and its veracity being unquestioned, and the Court should have directed and permitted the Petitioner to correct the omission in certification by supplemental transcript.

Specification of Error No. V.

The Court erred in affirming the decision of the District Court which held that a decision of the Board of Tax Appeals is *res judicata* and binding upon the Bankruptcy Court.

Specification of Error No. VI.

The Court erred in not holding that the Bankruptcy Court can review the final decision of the Board of Tax Appeals.

Specification of Error No. VII.

The Court erred in affirming the decision of the District Court which had disaffirmed the order of the Special Referee, for the reason that the amount or legality of any income taxes are properly heard and determined by the Court in Bankruptcy, and the Court in Bankruptcy has jurisdiction of all such questions, regardless of the ruling thereon by the Board of Tax Appeals.

Specification of Error No. VIII.

The Court erred in allowing the claim of the United States Government as a priority claim against the estate of said Bankrupt for the reason that said claim is based upon asserted income tax deficiencies during the fiscal years of 1926, 1927, and 1928, when, in fact, there was no taxable income unreported or upon which said bankrupt corporation did not pay income

taxes during the said years and no income tax deficiencies of any nature by said bankrupt corporation during said years.

Specification of Error No. IX.

The Court erred in not finding that the Carlisle Packing Company did not realize a taxable profit upon the transfer of its salmon canning plants, fishing equipment, contracts, leases, fish traps, trap locations, fishing rights and permits, etc., at Cordova, and Bristol Bay, Alaska, to the Bank of California during the fiscal year 1927, for the sum of $650,000.00 paid the Carlisle Packing Company by the satisfaction, cancellation and return of notes in that amount which the Carlisle Packing Company had previously executed and given to the bank for funds in that amount theretofore borrowed.

Specification of Error No. X.

The Court erred in not finding that the Carlisle Packing Company was, in fact, insolvent, at the time of the transfer of the plant, etc., to the Bank of California in satisfaction of its obligation to said bank in the year 1927.

Specification of Error No. XI.

The Court erred in ordering that said claim of the United States be paid for the reasons:

(a) That no sum of money whatsoever is due to the said Government of the United States from the said bankrupt corporation, and

(b) Said order is not supported by the facts out of which the alleged claim of the government arises, and

(c) Is contrary to law.

Specification of Error No. XII.

The Court erred in not ordering that the claim of the Government of the United States against the estate of the said bankrupt corporation be disallowed.

Specification of Error No. XIII.

The Court erred in allowing the claim of the Government of the United States against the estate of the said bankrupt.

Specification of Error No. XIV.

The Court erred in ordering that said claim of the said Government of the United States be paid.

SUMMARY OF ARGUMENT

I. There being no proper certified statement of the evidence before it, the Circuit Court of Appeals should have required the same to be returned to the trial court for proper settlement and authentication; or, if not so required, should have considered all matters before it and decided the case on the merits. The statement of evidence was not properly authenticated as required by equity rule 75b. No objection was made on that account by the respondents and briefs were filed and oral arguments made in the Circuit Court of Appeals without questioning the record. After the cause was thus submitted, the Court, of its own motion without suggestion from or reference to either party, raised the point, and affirmed the decree of the District Court as a penalty for violation of the rule.

It is apparent that the Court thought that the

question of the jurisdiction of the Court to determine the amount and legality of the income tax could not be determined from the record properly before it; and if the Court below was correct in that assumption, then petitioner asserts that he should have been permitted to file a supplemental transcript properly authenticated; that the drastic penalty of affirming the decree of the District Court should not have been imposed; that a failure to properly authenticate the record was an inadvertence and that an opportunity should have been granted to comply with equity rule 75b.

II. The Circuit Court of Appeals for the Ninth Circuit erroneously decided that the Bankruptcy Court was without jurisdiction to hear and determine the amount and legality of a claim for income taxes, section 64(a) of the Bankruptcy Act having given to the Bankruptcy Court complete jurisdiction to determine any question that arises as to the amount or legality of any such tax.

III. The Carlisle Packing Company, a corporation, now in bankruptcy, did not realize in its transaction with the Bank of California, National Association, a taxable income for the year 1927, and the Court was in error in allowing the Government's claim and ordering the same paid as a preference claim.

ARGUMENT

I.

There being no proper certified statement of the evidence before it, the Circuit Court of Appeals should have required the same to be returned to the Trial Court for proper settlement and authentication; or, if not so required, should have considered all matters before it and decided the case on the merits. The statement of evidence was not properly authenticated as required by Equity Rule 75b. No objection was made on that account by the respondents and briefs were filed and oral arguments made in the Circuit Court of Appeals without questioning the record. After the cause was thus submitted, the Court, of its own motion without suggestion from or reference to either party, raised the point, and affirmed the decree of the District Court as a penalty for violation of the rule.

1. The Circuit Court of Appeals should have required petitioner to file a supplemental transcript of record properly authenticated; or, on the record properly before it should have decided the case on the merits.

The jurisdiction of the Bankruptcy Court was challenged and the question was before the Circuit Court on the following record:

(a) The order of adjudication in bankruptcy (R. 2);

(b) The Government's claim for income taxes, the amount of which was fixed by an adjudication of the Board of Tax Appeals and a summary assessment of the Collector of Internal Revenue (R. 3);

(c) The objections to the claim for income taxes, filed by the trustees in bankruptcy proceeding (R. 6);

(d) The decision of the United States District Court, disaffirming the order of the special referee on the ground that the Bankruptcy Court was without jurisdiction (R. 114).

The jurisdiction of the United States District Court as a court in bankruptcy to determine the amount and legality of the claim for income taxes, based on a decision of the Board of Tax Appeals, was the matter presented to this appellate court as a matter of law.

The learned District Judge in his written decision, brought before the Circuit Court as part of the record, made no reference to the evidence, made no findings of fact thereon and based his decision on the sole question of law that—having before it a claim for income taxes based on a decision of the Board of Tax Appeals, the amount and legality of which was drawn in question by objection of the trustee—the matter was beyond the jurisdiction of the Court.

On oral argument petitioner conceded that the only matter before the appellate court for decision was the question of law on a challenge to the Bankruptcy Court's jurisdiction. The petitioner argued and presented only this question of law. The respondents, both in their brief and in oral argument, presented no question except the point of law as to the Bankruptcy Court's jurisdiction. The evidence was not considered or even referred to by either of the parties in oral argument before this Court.

Petitioner respectfully submits that the following

matters were properly before the Circuit Court as part of the record:

(a) Order of adjudication;
(b) Claim for income taxes;
(c) Objection to claim;
(d) Decision of the District Court.

Congress amended Section 269 of the Judicial Code by providing that:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."
>
> U. S. Code, Title 28, sec. 391.

Petitioner contends that under this statute the Court is to examine "the entire record before the Court" and that the above portion of the record, regardless of the statement of the evidence, brought the question of law before the Circuit Court of Appeals.

The Circuit Court of Appeals (Second Circuit) had before it a record on appeal, wherein the clerk of the court below had certified that the transcript is "a correct and complete transcript of the record," but the evidence and the instructions were contained therein with no certificate of authentication by the trial judge.

The Court, considering what was properly before it, after quoting the above statute, said:

> "* * * We are still unable to review the evidence, the charge, and the refusal to charge.

> "The indictment, however, is properly in this court, as it is a part of the record, and needs no bill of exceptions to make it such. And no bill of exceptions is necessary to make the demurrer to the third count a part of the record proper."
>
> *Buessel v. United States*, 258 Fed. 811, 821.

Not having a proper certified statement of the evidence before it, the Circuit Court of Appeals (Seventh Circuit) declared:

> "* * * Not only has appellant violated Rule 9 of this court, but it has failed to secure any approval or certification of the evidence as being all of the evidence received on the trial or necessary to present the case to this court on the merits.
>
> "We have, however, acted on the assumption that all of the evidence is in the record and have overlooked appellant's failure to comply with Rule 9 of this court and have studied the briefs and records with the result that we are entirely satisfied with the decree which was entered."
>
> *Interstate Folding Box Co. v. Empire Box Corporation*, 68 Fed. (2nd) 500.

Petitioner respectfully calls the Court's attention to the fact that the trial judge in no way considered the evidence, nor did he make any findings of fact. The trial court decided as a matter of law on the record before it, without considering the evidence, that the Court was without jurisdiction.

Indeed, the Bankruptcy Court's jurisdiction having been challenged and the Court deciding that it was without jurisdiction to hear the matter, it would not,

and in the circumstances could not, hear the evidence or make any findings of fact thereon.

2. The Circuit Court of Appeals should have required and permitted the petitioner to file a properly certified statement of the evidence by supplemental transcript.

In the alternative, the Court declining to decide the question of law as to the jurisdiction of the Court on the record properly before it, and finding that a statement of the evidence was necessary for a decision on the merits, should have ordered that the omission in certification with respect to the statement of evidence be corrected by a supplemental transcript.

The shaping of the statement of evidence and certification of the same being merely ministerial, sufficiently pertains to the making of the return to the appeal to enable the District Court to authenticate the statement of evidence at any time with the permission of this Court.

Struett v. Hill, 269 Fed. 247.

Having this very question before it, the Court of Appeals for the Ninth Circuit, considered whether or not the record should be returned to the trial court for proper settlement and authentication of a statement on appeal, or whether the appellate court would consider all matters before it and decide the case on the merits, and followed the latter course.

Title & Trust Co, v. Wernich, 69 Fed. (2nd) 811.

In *Sommer v. Rotary Lift Co.* (C. C. A. 9) 66 Fed. (2d) 809, in an equity appeal there was no statement of evidence whatever, yet the court ordered the sub-

mission to be vacated and a supplemental transcript containing a statement of the evidence. This decision was pointed out in the dissenting opinion in the instant case as being in conflict with the decision rendered by the majority of the court.

The Supreme Court of the United States, considering this question in *Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co.*, 275 U. S. 372, 386, decided that the penalty of dismissal or refusal to decide the case on the merits, where Equity Rule 75 was not followed, was too great and permitted the appellant to have the record conform to the rule:

> "* * * Of course, the practice was in contravention of the equity rule and the court of appeals was right in giving effect to the rule by declining to examine the mass of evidence wrongly reproduced. But the court did not stop there. It also affirmed the decree because of the transgression, and this notwithstanding the transgression was largely due to its own course of action. That was a very severe penalty to impose for action which had the court's implied sanction up to that time. The fact is not overlooked that after the original transcript was filed the appellee called attention to the requirement for condensation and narration and asked that the rule be given effect. But regard also is had for the fact that when the transcript was remitted the district court directed the reproduction of the testimony without condensation or narration.
>
> "When the particular situation in the seventh circuit is considered, we think it is apparent that

> the court of appeals passed the bounds of a sound discretion in affirming the decree, because of the transgression, and that, upon proper terms, it should have remitted the transcript to the district court to the end that a further opportunity might be had to comply with the equity rule. Such a remission should still be made, care being taken to require that the proceedings under the rule be conducted with reasonable dispatch."

Petitioner respectfully calls attention to the fact that the Court in the above decision directed and permitted the transcript to be remitted to the district court and enabled appellant to comply with equity rule, even though objection to the record had been made in the Circuit Court of Appeals. Here in this case no objection has been made to the record and both of the parties have treated the same as true and correct.

In this case, to affirm the ruling of the lower court as a penalty for failure to comply with equity rule, where the same plainly is mere inadvertence, is too severe.

It should be noted that no hearing involving the taking of evidence was had before the Federal judge. The evidence that had been taken before the referee was filed with the clerk of the court on the petition to review.

The hearing on revision before the District Judge was on the transcript of the evidence filed in the clerk's office by the referee. The District Court may be said to have had the evidence before it, but it did not consider the same, made no findings of fact there-

on and based its decision on the question of law raised on the objection to the jurisdiction of the court.

The drastic remedy of affirming the decree as a penalty for violation of the rule should not be applied in this case.

In re General Equity Rule 75, 222 Fed. 884, 886.

This case is to be considered on the whole as a matter in equity and the rights of the parties should be given equitable consideration. The claim for income taxes with interest accrued to date amounts to approximately $25,000.00. A review of the allowance of this large claim is to be denied for inadvertently failing to comply with the equity rule in question. Petitioner did not refuse to comply. And having petitioned the Court at the earliest moment after the matter was brought to his attention, was denied the right to comply with the rule.

Petitioner begs to show to this Court that the evidence in this case is brief, the actual testimony of witnesses covering but ten and one-half pages, the remainder of the statement of evidence consisting entirely of documentary evidence by way of exhibits; that the entire statement of evidence, exhibits included and excluding the record proper, is short, containing less than one hundred pages.

II.

The Circuit Court of Appeals for the Ninth Circuit erroneously decided that the Bankruptcy Court was without jurisdiction to hear and determine the amount and legality of a claim for income taxes, Section 64(a) of the Bankruptcy Act having given to the Bankruptcy Court complete jurisdiction to determine any question that arises as to the amount or legality of any such tax.

1. The Bankruptcy Court has plenary power to hear and determine claims in Bankruptcy proceedings for income taxes.

The contention of the trustee on behalf of the bankrupt is that Section 64a of the Bankruptcy Act gives to the bankruptcy court complete jurisdiction to determine any question that arises as to the amount or legality of any such tax.

Section 64a of the Bankruptcy Act reads as follows:

> "Sec. 64a. The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order or priority as set forth in paragraph (b) hereof; PROVIDED, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, *and in case any*

question arises as to the amount or legality of any such tax the same shall be heard and determined by the Court." (Italics ours)

This section was amended May 27th, 1926, but the closing lines of the section have not been changed and still read as they did under the Bankruptcy Act of 1898:

"* * * *and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the Court.*"

U. S. Code, Section 104, subdivision a, Title 11, Bankruptcy.

It is most emphatically asserted that the bankruptcy court always did have, and still has, complete jurisdiction to determine the amount or legality of any tax that is claimed to be due from the bankrupt. We contend that there has been no change in this regard by the enactment of the Revenue Law of 1926, nor by any of the revenue enactments since that time. As recent as 1934 the Federal courts have re-announced the position always taken by the bankruptcy courts since the Bankruptcy Act of 1898. That under this Section 64a, above, the amount or legality of any tax shall be heard and determined by the bankruptcy court, and that it is never concluded by any finding or decision of a taxing board, whether State or Federal, nor by any other court.

In construing Section 64a of the Bankruptcy Act, the Supreme Court of the United States declared:

"The Section (64a) itself declares that in case of disputes as to the amount or legality of any such tax, they shall be heard and determined by

the Court. The State Court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a federal statute, giving preference to tax, is a federal question, of ultimate decision in this court.

* * * * * * * *

"Coming to the specific objections to the claim for the year 1902, the claim was presented upon the basis of $40,000,000.00 of outstanding capital stock, when in fact there was only $10,000,000.00 of such stock, the assessment by the State Board being upon the former sum and made upon the failure of the corporation to report. But we do not think the finding of the State Board is conclusive. The tax is to be assessed upon capital actually outstanding. It may well be doubted whether the board had power to tax any other stock. But be that as it may, Section 64a, specifically provides that in any case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the Court, with a view to ascertaining the amount really due. We do not think it was the intention of Congress to conclude the Bankruptcy Courts by the findings of Boards of this character, and that the claim should have been upon the basis of the capital stock actually outstanding."

New Jersey v. Anderson, 203 U. S. Rep. 483, 27 Sup. Ct. 137.

It was held in a decision by the Circuit Court of Appeals for the Seventh Circuit that the bankruptcy court is directed by Section 64a of the Bankruptcy Act

to determine independently the "legality of any such tax":

> "But if we are mistaken, and if the *Singer Company* case is to be accepted as an authoritative assertion that the charge in question is a tax, we do not believe that the United States Bankruptcy Courts are bound to follow it blindly. The question with them is the interpretation and application of Section 64a. If the legislature of a state gives the name 'tax' to an exaction which is not a tax, and if the courts of the state join in the misnomer, surely the bankruptcy courts are not required to disregard the substance of the same, to the detriment of other claimants. The state courts may authoritatively expound the substance, and the federal courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name. And moreover the latter part of Section 64a seems to direct the bankruptcy court to determine independently the 'legality of any such tax'."
>
> *In re Cosmopolitan Power Company*, 137 Fed. 858, 862.

To the same effect are the following cases:

In re W. P. Williams Oil Co., 265 Fed. 401;
In re Sheinman, 14 Fed. (2d) 323;
In re General Film Corp., 274 Fed. 903;
In re Heffron Co., 216 Fed. 642;
In re Anderson, 275 Fed. 397, aff'd 279 Fed. 525;
In re United Five and Ten Cent Store, 242 Fed. 1005;

In re Heller, Hirsh & Co., 258 Fed. 208;
Commonwealth of Massachusetts v. Meehan, 67 Fed. (2d) 638, 640;
In re Elaborated Ready Roofing Co., 78 Fed. (2d) (C. C. A. 7th) 75.

The government seems to take the position that the rule would be different since the Revenue Act of 1926. However, their contention in this matter is not sustained by the decisions. A decision by the Federal District Court for Massachusetts in the year 1927 declared:

> "The amount of the tax being in dispute, the court is not bound by the determination of the Commissioner (of Internal Revenue). Bankruptcy Act, Section 64a, *New Jersey v. Anderson*, 203 U. S. 483, *In re Fisher Corp.*, 229 Fed. 316."
>
> *In re George F. Redmond & Co.*, 17 Fed. (2d) 128.

The United States Treasury Department, by its regulations, issued under the Revenue Act of 1932, clearly recognizes that the bankruptcy courts have complete jurisdiction regarding the amount and validity of the taxes of a bankrupt.

We quote the following therefrom:

> "Bankruptcy courts have complete jurisdiction under Section 64(a) of the National Bankruptcy Act to determine all disputes regarding the amount and validity of the taxes of a bankrupt."
>
> Regulations 77, "Income Tax," Revenue Act of 1932, Article 1191, p. 313.

That the decision of the Board of Tax Appeals is not binding upon the Bankruptcy Court, is sustained

by General Counsel Memorandum 1 (G. C. M. 1, V-2 CB 92 issued by Honorable A. W. Gregg, General Counsel of the Bureau of Internal Revenue in the following language:

> "Section 282(a)" (which is Section 274(a) 1932 Act heretofore set forth.) "does not seem to provide for a dismissal of a petition filed by a taxpayer with the Board of Tax Appeals for the redetermination of the deficiency, if such petition was filed with the Board prior to the adjudication of bankruptcy of a taxpayer in a bankruptcy proceeding and prior to the immediate assessment provided for in section 282(a). It would therefore seem that in such a case the taxpayer, or the legal representative, might prosecute the petition in the Board of Tax Appeals to final determination before said Board, but whatever might be the final decision of the Board would seem not to be binding upon the bankruptcy court in passing upon any claim for deficiency filed with said court, as provided in section 282(a). This is emphasized by the provisions contained in subdivisions (b) and (c) of Section 282 * * *."

III.

The Carlisle Packing Company, a corporation, now in bankruptcy, did not realize in its transaction with the Bank of California, National Association, a taxable income for the year 1927, and the Court was in error in allowing the government's claim and ordering the same paid as a preference claim.

1. On the transaction with the Bank of California, the Bankrupt reduced or extinguished liabilities without any increase in assets and did not acquire anything of exchangeable value in addition to what it had before.

Did the Carlisle Packing Company realize a taxable income by surrender of all its Alaskan properties to the Bank of California during the fiscal year 1927, for which said bank cancelled $650,000.00 of the packing company's indebtedness for the purpose of avoiding complete liquidation of the Carlisle Packing Company and to enable it to continue business and pay the balance of the creditor's claim?

The bank had no mortgage or priority claim on the properties surrendered to it, and had a balance of a claim for indebtedness after such cancellation of several hundred thousands of dollars, all of which was later paid.

And let us here comment on the case of *Kerbaugh-Empire Co. v. Bowers, Collector of Internal Revenue*, 271 U. S. 170, 46 Sup. Ct. 449, in which case the taxpayer was engaged in the performance of large construction contracts and the borrowed money was lost in the enterprise. The taxpayer made a settlement with its creditor for an amount less than the original

indebtedness, and the court, holding that the difference did not represent taxable income, had this to say:

> "* * * When the loans were made and notes given the assets and liability of the defendant in error were increased alike. The loss of the money borrowed wiped out the increase in assets but the liability remained. The assets were further diminished by payment of the debt. The loss was less than it would have been if marks had not declined in value; but the mere diminution of loss is not gain, profit or income."

In the instant case, when it commenced business transactions with the Bank of California, it had a surplus of $1,017,749.22, and on November 30th, 1926, it had only a surplus of $51,208.06, or had lost approximately $1,000,000.00 in operations on the borrowed money from said bank. The loss of the money wiped out any increase in assets, but the liability remained and the assets were further diminished by the payment of the debt.

After the Carlisle Packing Company had surrendered its properties to the bank for the cancellation of $650,000.00 of its notes, it still owed the bank considerable money on principal and interest.

Surely, in the instant case there was nothing "received" or "drawn" by the recipient (taxpayer) for its *separate use, benefit and disposal.*

It is the contention of the trustee that in the instant case there was no taxable income for the year 1927 within the definition of income laid down by the United States Supreme Court in *Eisner v. McComber*, 252 U. S. 189, 40 S. Ct. 199, and which is

the leading case on the question. In this case, and in all subsequent cases on income, the Court relies upon the following definition of "income":

> "* * * Here we have the essential matter; not a gain accruing to capital; not a growth of increment of value in the investment; but a gain, a profit, something of exchangeable value, proceeding from the property, severed from the capital, however invested or employed, and coming in, being 'derived'—that is, *received or drawn* by the recipient (the taxpayer) for *his separate use, benefit and disposal*—that is income derived from property. Nothing else answers the description."

The trustee further contends that the Bank of California, in order to benefit the bankrupt to the extent that it could continue in business, forgave and cancelled $650,000.00 of indebtedness for the surrender to it of the Alaska properties of a book value of $345,000.00 and that the difference between those two amounts of approximately $305,000.00 was not taxable income. That this transaction resulted in a reduction of assets with a corresponding reduction in liabilities.

In the case of *Kerbaugh-Empire Co. v. Bowers, Collector of Internal Revenue*, 271 U. S. 170, 46 S. Ct. 449, the court stated in its decision:

> "* * * As has been forcibly stated by counsel for plaintiff, stripped of many of its complications, the situation presented here is about as follows: A. borrowed from B. in 1911 the sum of $1,000.00. A., immediately after borrowing that

sum, lost or spent it. In 1921 A., not having earned anything as the result of personal efforts or use of capital, had in his possession the sum of $100.00. With that $100.00 A. approaches B. and offers him the $100.00, which is all the money he has, if B. will take it as a full settlement of $1,000.00 indebtedness. B. accepts it in full settlement of the indebtedness, and releases A. Has A. any income, within the meaning of the word 'income' as used in the Sixteenth Amendment? If so, where is it, and how or when did he receive it? If A., in the illustration has no income, then clearly this plaintiff had no income in 1921 in the item of $684,456.18, and is entitled to judgment."

We desire to state that the question here involved as to a taxable income on the transaction has been decided adversely to the Government's contention. On this whole question of taxable income trustee relies on a late decision in a parallel case, which was brought before the court on a petition for review of a decision of the Board of Tax Appeals and in reversing that Board's decision, the Court declares:

"* * * Taxable income is not acquired by a transaction which does not result in the taxpayer getting or having anything he did not have before. Gain or profit is essential to the existence of taxable income. A transaction whereby nothing of exchangeable value comes to or is received by a taxpayer does not give rise to or create taxable income. *Commissioner of Internal Revenue v.*

Rail Joint Co., 61 Fed. (2d) 752; *Bowers v. Kerbaugh-Empire Co.* 271 U. S. 170; *Burnett v. John F. Campbell Co.*, 50 Fed. (2d) 487.

"The decision that the petitioner acquired taxable income as a result of the cancellation of its debt to its lessor was erroneous. The petition is granted, and the order under review is reversed."

The Dallas Transfer Etc. Co. v. Com'r. of Internal Revenue, 70 Fed. (2d) 95.

In the foregoing cited case the taxpayer was in no condition to pay the indebtedness and was insolvent. In the case at bar the evidence shows that the bankrupt was in no condition to pay its indebtedness and was insolvent. In the case cited above the taxpayer at the time it surrendered certain of its property to its creditor for release of indebtedness, was insolvent. In the case at bar the bankrupt at the time it surrendered certain of its property to its creditor for release of indebtedness, was insolvent. In the case at bar the taxpayer surrendered property, the basis of value of which was considerably less than the indebtedness released therefor. In the case cited above the taxpayer surrendered property, the basis of value of which was conisderably less than the indebtedness released. In the case cited above, if suit had been brought it would have resulted in putting petitioner out of business. In the case at bar, if suit had been brought it would have resulted in putting the bankrupt out of business.

In both cases there was a reduction or extinguishment of liabilities without any increase in assets and neither of the cases resulted in the debtors acquiring

something of exchangeable value in addition to what they had before.

In the instant case there is an absence of such a gain or profit as is required to come within the accepted definition of income.

The trustee contends, notwithstanding claimant's assertions to the contrary, that at no time has he abandoned the "theory" that the bankrupt corporation was insolvent at the time of the surrender of its properties to the Bank of California. The evidence produced at the hearing deals specifically with this question and also shows that the corporation paid off its debts for less than the amount borrowed.

Furthermore, these two points have been consistently contended by taxpayer at all times since the determination of the deficiency by the Commissioner.

CONCLUSION

In conclusion, we respectfully submit that this cause should be heard and decided on the merits. It is to the interest of both parties to have a decision on an important question of law touching the jurisdiction of the bankruptcy court.

Petitioner urges that the question of jurisdiction was raised on the record properly before the Circuit Court of Appeals, without consideration of the statement of evidence. The District Court, sitting in bankruptcy, with a claim filed for income taxes based on a decision of the Board of Tax Appeals and the Internal Revenue Collector's summary assessment, to

which claim the trustee objected, decided that it was without jurisdiction. The District Court decided, as a matter of law on the record, and not on the evidence, that the decision of the Board of Tax Appeals was *res judicata* as to the amount and validity of the claimed indebtedness for income taxes.

In the alternative, in the event that the Court deems it necessary to a decision on the merits, the record should be remitted for proper certification with respect to the statement of evidence by a supplemental transcript. Equity Rule 75b, by inadvertence, was not complied with. We call attention to the fact that the evidence having been filed with the Clerk of the Court by the referee, and not having been introduced as on a trial before the judge, it was inadvertently treated as part of the record. Both parties have treated it as a statement of evidence as true and correct. Although improperly authenticated, the respondents did not object to it. The cause was submitted on briefs and oral argument, without hint or suggestion that the record was improperly authenticated.

The practice did not comply with the equity rule, and we could make no complaint had the Court required a compliance.

But, affirming the decree of the District Court, because of the transgression, is going much farther; and is exacting an enormous penalty for failure to comply with the rule.

We respectfully submit that in equity and justice this severe penalty should not be exacted. A claim, with interest, totaling approximately $25,000.00, is to

be ordered paid over objection without a hearing on the merits.

Petitioner contends that Section 64(a) of the Bankruptcy Act gives the bankruptcy court jurisdiction in any circumstances to determine the amount and legality of the claim for income taxes.

Petitioner contends that after the decision of the Board of Tax Appeals, the taxpayer having been adjudicated a bankrupt, and a claim for income taxes based on the Board's decision is filed in the bankruptcy proceedings, and such claim being questioned, the amount and legality of such claim may thereupon be determined by the bankruptcy court.

We submit that the bankruptcy court is still clothed, as it always has been, with plenary power to determine the amount and legality of every claim for taxes, including a claim based on a decision of the Board of Tax Appeals. That to take away such power by implication, as respondents must claim by virtue of the Revenue Act, would mean that a statute of the United States establishing a court and defining its jurisdiction could thus be modified or amended, and that such court could no longer carry out its primary function to administer a fair and equitable distribution of the bankrupt's estate to all the creditors.

The rule laid down in *New Jersey v. Anderson*, 203 U. S. 486, declares the law that should govern this case, and the decision of the lower courts are clearly in conflict with the same.

And finally it is submitted that there was no taxable income realized by the Carlisle Packing Company in its transaction with the Bank of California, Na-

tional Association, and that the lower courts should have heard and determined this question, and now this court should determine and decide that there was no taxable income realized.

The rule as to taxable income set forth in *Eisner v. McComber*, 252 U. S. 189, 40 S. Ct. 199, and *The Dallas Transfer Etc. Co. v. Com'r. of Internal Revenue*, 70 Fed. (2d) 95, is the rule and the law that governs the situation here, and the decisions of the lower courts are at variance therewith.

We respectfully submit that the decision of the Court below should be reversed.

Respectfully submitted,

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92919—36

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 309

S. P. KELLY, TRUSTEE IN BANKRUPTCY FOR THE CARLISLE PACKING COMPANY, A CORPORATION, BANKRUPT, PETITIONER

v.

UNITED STATES OF AMERICA, AND THE COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA, AND THE COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 10) is reported in 29 B. T. A. 514. The opinion of the special referee in bankruptcy (R. 90) is not reported. The memorandum decision of the

District Court (R. 138) is reported in 12 F. Supp. 11.

The opinion of the Circuit Court of Appeals (R. 158) is reported in 83 F. (2d) 783. The opinion on the petition for rehearing (R. 163) is not yet reported but is published in Vol. 4, C. C. H., 1936, p. 9399.

JURISDICTION

The decree of the Circuit Court of Appeals affirming the decision of the District Court was entered on May 5, 1936 (R. 162). Petition for rehearing was filed on June 1, 1936, and order denying same was entered June 29, 1936 (R. 163). The petition for a writ of certiorari was filed on August 24, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, on an appeal from a decision allowing a claim against a bankrupt estate for income taxes in excess of $500, the Circuit Court of Appeals properly refused to examine into the merits in the absence of any statement of the evidence duly verified by a certificate of authentication of the District Court.

2. In the alternative, should the Circuit Court of Appeals remand the case to the District Court to have statement of the evidence authenticated under Equity Rule 75 (b).

STATUTES, EQUITY RULES, AND GENERAL ORDERS IN BANKRUPTCY INVOLVED

These will be found in the Appendix, *infra*, pp. 11–13.

STATEMENT

On December 6, 1933, the United States Board of Tax Appeals promulgated its opinion and findings in two consolidated cases of the *Carlisle Packing Co.* v. *Commissioner,* Docket Nos. 55209 and 64926, approving and confirming income tax deficiencies for the fiscal years ended November 30, 1927, 1928, and 1929, in the respective amounts of $12,429.82, $1,435.49, and $1,473.88, which had theretofore been asserted by the Commissioner of Internal Revenue in deficiency letters to that corporation (R. 9–13). Pursuant to that opinion, final orders and decisions were entered in those two proceedings by the Board on January 4, 1934, that there were deficiencies in the income taxes of that corporation for the three taxable years and in the respective amounts above shown (R. 16, 19). No appeal was ever taken from those decisions of the Board (R. 93).

On January 10, 1934, a receiver for the taxpayer corporation was appointed by the Superior Court of the State of Washington for the County of Whatcom (R. 92). Under an involuntary petition in bankruptcy filed against it on January 19, 1934, the taxpayer was adjudicated a bankrupt on February 9, 1934, in the United States District Court for the Western District of Washington, Northern

Division (R. 2). In June 1934 the Collector of Internal Revenue filed sworn proof of claim in bankruptcy covering assessments of income tax deficiencies for the three taxable years in question in the principal sums above mentioned, aggregating $20,515.52, plus interest (R. 3–5).

After hearing upon the trustee's objections, the special referee in bankruptcy disallowed the claim in full on December 31, 1934 (R. 90–102). Petition to review the referee's order and decision was filed by the United States Attorney on January 7, 1935 (R. 107–112), and was heard by the District Court on February 18, 1935. At that hearing, the District Judge permitted the parties to put additional evidence into the record (R. 112–113). On May 6, 1935, the District Court reversed the referee's order and entered decree in favor of the United States for the full amount above mentioned, plus interest as a priority claim under Section 64 (a) of the Bankruptcy Act, as amended (*infra,* p. 11), against the bankrupt estate (R. 115). On June 1, 1935, petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit from that decree (R. 115–124).

Pursuant to a praecipe served and filed by the petitioner (R. 128–130), the clerk of the District Court on August 13, 1935, certified to the correctness of a typewritten transcript of certain portions "of the record, papers and other proceedings in the * * * cause as is required by praecipe of counsel" (R. 131–132).

The transcript so certified was duly filed in the Circuit Court of Appeals (R. 133). It contained no certification of authenticity as to any statement of evidence submitted to and acted upon by either the referee or the District Judge successively. The Circuit Court of Appeals, by a divided court, held that the evidence was not properly brought into the record before it and that it could not therefore consider the petitioner's assignments of error because they raised questions the consideration of which would require an examination of the evidence. It accordingly affirmed the judgment of the District Court (R. 157–162). In denying the petition to rehear, again by a divided court, the court below rejected the suggestion that the case be remanded to the District Court to supply a properly authenticated statement of the evidence by a supplemental transcript (R. 161, 167–168). The question of sufficiency of the record was first raised upon the court's own motion in the Circuit Court of Appeals (R. 158–161).

ARGUMENT

1. The petitioner concedes (Br. 7) that the statement of evidence which is set forth in the transcript of record in the present case was not properly authenticated. He states that his failure to comply with the rule regulating the manner of preparing and certifying the statement of evidence on appeal was inadvertent, and seems to argue that the court below should have disregarded the imper-

argue that the questions presented to the court below did not depend upon an examination of the evidence. If this is so, clearly the court below was correct in refusing to go into those questions.

It is clear from petitioner's assignment of errors to the court below (R. 119) that many, if not all, of those assignments could not be considered without looking to the evidence. The only question presented by those assignments which the petitioner seeks this Court to review is the question of *res judicata*. It is not entirely clear that a determination of that question would not require a consideration to some extent of the evidence taken before the referee, and this evidence is not properly in the record on appeal. From the opinion filed by the court below on the petition for rehearing (R. 163, 164), it would appear that the petitioner argued there that consideration of the question of *res judicata* would not require an examination of the evidence, but as petitioner does not make a like contention here we assume that he no longer presses that point.

2. The petitioner, under the heading "First Point", states (Br. 2) that the court below "erroneously decided that the bankruptcy court was without jurisdiction to hear and determine the amount and legality of a claim for income taxes, not justified by the facts and contrary to the decisions of this court and contrary to the rulings of other Circuits and contrary to the weight of the

authorities." If this statement be taken as petitioner's specification of error and if it be construed as raising the question of *res judicata*, as petitioner evidently intends it to, it should be noted that the court below did not pass upon the question. If the court below could have properly passed upon the question, it would have been necessary, we submit, for that court to have affirmed, as it did upon another ground, the judgment of the District Court.

None of the decisions cited by the petitioner involves the effect in a bankruptcy court of a final decision of the Board of Tax Appeals rendered after the enactment of the Revenue Act of 1926, and, so far as we have been able to ascertain, the present case is the first in which the precise question here raised has been presented. The reasoning of analogous cases, though, leads inevitably to the conclusion that the tax liability of a bankrupt corporation which has already been adjudicated by a final decision of the United States Board of Tax Appeals under an appeal taken to the Board by the taxpayer after the enactment of the Revenue Act of 1926, may not be relitigated in a bankruptcy court. Cf. *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716, 728; *Bankers' Reserve Life Co.* v. *United States*, 44 F. (2d) 1000 (C. Cls.), certiorari denied, 283 U. S. 836; *Green* v. *MacLaughlin*, 55 F. (2d) 423 (E. D. Pa.); *Brampton Woolen Co.* v. *Field*, 56 F. (2d) 23 (C. C. A. 1st), certiorari denied, 287 U. S. 608.

CONCLUSION

There is no conflict of authority upon the points made by the petitioner, and the decision below reached the correct result. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1936.

APPENDIX

Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended:

SEC. 25. *Appeals.*—(a) Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeals of the United States, * * * in the following cases, to wit: * * * (3) from a judgment allowing or rejecting a debt or claim of $500 or over. * * *. (U. S. C., Title 11, Sec. 48 (a).)

SEC. 63. *Debts provable against.*—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or * * *, absolutely owing at the time of the filing of the petition against him, * * * (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, * * *. (U. S. C., Title 11, Sec. 103.)

SEC. 64. *Debts which have priority.*—(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in the order of priority as set forth in paragraph (b) hereof: * * * and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court. * * * (U. S. C., Title 11, Sec. 104.)

General Order in Bankruptcy XXXVI, as amended April 17, 1933, 288 U. S. 621, 632:

APPEALS

Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in equity in courts of the United States.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 274. BANKRUPTCY AND RECEIVERSHIPS.

(a) *Immediate assessment.*—Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the restrictions imposed by section 272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

United States Supreme Court Equity Rules, as amended May 31, 1932, 286 U. S. 570:

> RULE 75. RECORD ON APPEAL—REDUCTION AND PREPARATION.
>
> In case of appeal:
>
> (a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a praecipe which shall indicate the portions of the record to be incorporated into the transcript on such appeal. * * *
>
> (b) The evidence to be included in the record, * * * shall not be set forth in full, but shall be stated in simple and condensed form, * * *. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his praecipe under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, * * * the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 309

S. P. KELLY, TRUSTEE IN BANKRUPTCY FOR THE CARLISLE PACKING COMPANY, A CORPORATION, BANKRUPT, PETITIONER

v.

UNITED STATES OF AMERICA, AND THE COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA, AND THE COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the special referee in bankruptcy (R. 90–102) is not reported. The memorandum decision of the District Court (R. 138–153) is reported in 12 F. Supp. 11.

The opinion and dissenting opinion of the Circuit Court of Appeals (R. 158–161) are reported in

83 F. (2d) 783, and the opinion and dissenting opinion on rehearing (R. 163–168) are reported in 84 F. (2d) 541.

The opinion of the United States Board of Tax Appeals in the proceeding before it relative to the same tax liability (R. 9–13) is reported in 29 B. T. A. 514.

JURISDICTION

The decree of the Circuit Court of Appeals affirming the decision of the District Court was entered on May 5, 1936. (R. 162.) A petition for rehearing was filed June 1, 1936, and denied June 29, 1936. (R. 163.) The petition for a writ of certiorari was filed August 24, 1936, and was granted October 12, 1936. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, on an appeal from a decision allowing a claim against a bankrupt estate for income taxes in excess of $500, the Circuit Court of Appeals properly refused to consider the merits of the case, in the absence of a statement of evidence duly verified by a certificate of authentication of the District Court as required by Equity Rule 75 (b).

2. In the alternative, was the Circuit Court of Appeals required to remand the case to the District Court to have a statement of the evidence authenticated under Equity Rule 75 (b)?

3. If the Circuit Court of Appeals should have reviewed the issues raised on the merits, was the decision of the Board of Tax Appeals entered prior to the adjudication in bankruptcy *res judicata* as to those issues?

STATUTES AND OTHER AUTHORITIES INVOLVED

These will be found in the Appendix, *infra*, pp. 39–49.

STATEMENT [1]

On December 6, 1933, the United States Board of Tax Appeals promulgated its findings of fact and opinion in the two consolidated cases of *Carlisle Packing Co.* v. *Commissioner of Internal Revenue*, Docket Nos. 55209 and 64926 (29 B. T. A. 514). The final orders of the Board pursuant to that opinion, which were entered on January 4, 1934 (R. 16, 19), sustained the Commissioner in his determination of income tax deficiencies for that company for the fiscal years ending November 30, 1927, November 30, 1928, and November 30, 1929, in the respective amounts of $12,429.82, $1,435.49, and $1,473.88 (R. 10–14). No appeal was ever taken. (R. 93.) On January 12, 1934, a summary assessment of these taxes, plus interest, was made against the company.

Meanwhile, on January 10, 1934, a receiver for the company had been appointed by the Superior

[1] Respondent contends that the statement of evidence must be disregarded because not properly authenticated. See Point I, *infra*. Many of the facts set out in this Statement are found only in the unauthenticated record. They are set out here merely for the convenience of the Court.

Court of the State of Washington, Whatcom County (R. 92), and on January 19, 1934, an involuntary petition in bankruptcy was filed against it in the United States District Court for the Western District of Washington. (R. 2.) On February 9, 1934, the company was adjudicated a bankrupt by that court. (R. 2.)

In June, 1934, the Collector of Internal Revenue for the District of Washington filed a claim in bankruptcy covering assessments of the income taxes previously mentioned in the aggregate amount of $20,515.32, plus interest. (R. 3–5.) The trustee filed objections to the claim (R. 6–7), and a hearing was had before a referee (R. 7–89). At this hearing the attorney for the Government introduced in evidence, and as part of its proof of claim, certified copies of the opinion and decisions of the Board in the cases previously mentioned, and certified copies of the assessment list. (R. 8–24.) The attorney for the Government also objected to the introduction of any evidence by the trustee as to the merits of the tax claim, on the ground that the decision and orders of the Board on the same matters had become final and were *res judicata*. (R. 24–25.) The referee admitted the evidence, reserving his ruling on the objection to its admission. (R. 25.)

On December 31, 1934, the referee disallowed the claim, holding that the decision of the Board of Tax Appeals was not *res judicata* because of special features governing its jurisdiction and that

of the bankruptcy court, and also holding, on the merits, that the claim for taxes should be disallowed. (R. 90–102.)

On January 7, 1935, a petition for review of the order was filed by the Government. (R. 107–112.) At the hearing before the District Judge the bankrupt's income tax returns for the fiscal years ending November 30, 1928, and November 30, 1929, were ordered made a part of the record. (R. 112–113.) On May 6, 1935, the District Judge reversed the order of the referee, and entered a decree for the United States in the full amount claimed. (R. 114–115.)

Pursuant to a praecipe served and filed by the trustee (R. 128–130), the clerk of the District Court on August 13, 1935, certified to the correctness of a typewritten transcript of certain portions "of the record, papers and other proceedings in the * * * cause as is required by praecipe of counsel" (R. 131–132). The transcript, so certified, was duly filed in the Circuit Court of Appeals (R. 133). It did not contain any certification of authenticity by the District Judge as to any statement of evidence submitted to and acted upon by either the referee or the District Judge.

The court below, on its own motion, raised the question of the sufficiency of the record (R. 158–161) and held, by a divided court, that the evidence was not properly brought into the record before it, and that it could not consider the

trustee's assignments of error because they raised questions the consideration of which would require an examination of the evidence. It accordingly affirmed the decree of the District Court (R. 157–162). In denying the petition to rehear, again by a divided court, the court below rejected the suggestion that the case be remanded to the District Court to supply a properly authenticated statement of the evidence by a supplemental transcript (R. 166–168).

SUMMARY OF ARGUMENT

The court below declined to review the merits of the case for the reason that the petitioner had failed to comply with the provision of Equity Rule 75 (b) (Appendix, *infra*, p. 46), requiring authentication of the statement of evidence by the District Judge.

The petitioner admits that he did not comply with Rule 75 (b) but contends that the court should have granted his request that the case be remanded to the District Court in order that the statement of evidence might be properly authenticated or in the alternative that the court below could have considered the issues of law involved without a statement of evidence.

It is settled that where the questions to be decided depend upon an examination of the evidence and the statement of evidence included in the record has not been authenticated as required by Equity Rule 75 (b), the decree of the lower court on issues requiring an examination of the evidence

must be affirmed. The rule is similar to that applied in law cases where there is no properly authenticated bill of exceptions.

Most of the cases cited by the petitioner in support of his position that the case should be remanded for authentication are cases in which the record was properly authenticated but there was not a condensed, narrative statement of the evidence. In that type of case the courts have not always insisted on the strict enforcement of the rule, although they may do so, and have done so in some instances.

There are but few instances in which the appellate courts have remanded a case for authentication of the record. We submit that if they may do so in their discretion, there was no abuse of discretion by the court below in this case.

The primary record in this case presented no question of law which the court below might have reviewed. It could not determine whether the bankrupt was liable for the tax or whether the Board's previous decision was *res judicata* without examining the statement of evidence. It was not required to pass on the hypothetical question whether the Board's decision could ever be *res judicata* in a bankruptcy court.

Inasmuch as the court below did not pass upon the question whether the Board's previous determination of the bankrupt's liability for the fiscal years 1927, 1928 and 1929 was *res judicata,* we believe that this Court should not review that ques-

tion. On the record as it stands it can only consider the hypothetical question whether in any case the Board's decision could have that effect. We discuss the issue only because it was raised in the petition for a writ of certiorari.

We admit that under Section 64 (a) of the Bankruptcy Act (Appendix, *infra,* p. 39) the bankruptcy court is given authority to examine the Government's claim for taxes and is not bound by the Commissioner's assessment. But it does not follow that the bankruptcy court may redetermine a tax claim after it has been adjudicated by the Board of Tax Appeals, the decision of the Board having been entered prior to the filing of the petition in bankruptcy and the adjudication in bankruptcy.

Section 274 (a) of the Revenue Act of 1928 (Appendix, *infra,* p. 43) provides that no petition shall be filed with the Board after the adjudication in bankruptcy, but it does not provide that a petition already filed with the Board shall be dismissed. The implication is that the Board and the bankruptcy court have concurrent jurisdiction in the second type of case.

The legislative history of the provision supports this construction, and further shows that Congress expected the bankruptcy court to follow a prior decision of the Board. The Commissioner of Internal Revenue has placed that construction upon it in his regulations, and the Board of Tax Appeals has adopted that construction.

The concurrent jurisdiction of the Board and the bankruptcy court is similar to the concurrent jurisdiction of the Board and the District Courts in cases where an appeal was taken to the Board under the Revenue Act of 1924 (c. 234, 43 Stat. 253), and decided under the Revenue Act of 1926. In that situation the courts have held that the taxpayer could sue for a refund in the District Court, notwithstanding the Board's decision, but that the latter would be *res judicata* as to issues determined by the Board.

With respect to cases where the petition to the Board has been filed after the passage of the Revenue Act of 1926, the District Courts and the Court of Claims have not accepted jurisdiction of subsequent suits for refund, except as to certain issues covered by statutory exceptions.

There is no merit to the taxpayer's contention that the doctrine of *res judicata* does not apply because the bankruptcy proceeding involves the rights and claims of all creditors, and not merely the claim of the Government. The instant proceeding concerns only the Government's claim, and the question is whether the Board's decision on that claim is conclusive.

While the trustee was not a party before the Board, he is in privity with the bankrupt, and a decision which would be conclusive as to the bankrupt would be conclusive as to the trustee.

ARGUMENT

I

THE COURT BELOW PROPERLY REFUSED TO CONSIDER THE MERITS OF THE PRESENT CASE

Petitioner admits that he did not comply with the provisions of Equity Rule 75 (b), as amended (*infra*, p. 46), which is made applicable to appeals in bankruptcy by virtue of General Order in Bankruptcy XXXVI, as amended (*infra*, p. 40). There was no certification of the record except by the Clerk of the District Court, who certified to the correctness of a typewritten transcript of certain portions of the record, papers and proceedings as required by the praecipe of counsel. Upon a determination of that fact, the court below declined to review the merits of the case, and affirmed the decision of the District Judge. We submit that this disposition of the case was in all respects proper.

First, petitioner contends that the court below could, upon the record before it, decide the issue of law involved in this proceeding. Second, and in the alternative, he urges that the court should have granted his request that the case be remanded to the District Court so that the record could be made adequate to present this legal issue. We shall discuss these contentions in that order.

A. The record before the lower court was insufficient to allow a determination of the issues which petitioner seeks to raise

The principle is well settled that where the decision of any question raised in an appellate court depends upon an examination of the evidence, an improperly certified statement of evidence will be treated as a nullity, and the decision below on any question which requires consideration of the evidence will be affirmed. *Chickasaw Wood Products Co.* v. *Paysinger,* 84 F. (2d) 476 (C. C. A. 8th); *Trust Co. of Florida* v. *Gault,* 69 F. (2d) 133, 134 (C. C. A. 5th); *Interstate Folding Box Co.* v. *Empire Box Corp.,* 68 F. (2d) 500 (C. C. A. 7th), certiorari denied, 292 U. S. 657; *Oriole Phonograph Co.* v. *Kansas City Fabric Products Co.,* 34 F. (2d) 400, 401 (C. C. A. 8th), certiorari denied, 280 U. S. 609. See also *Walker* v. *Lee,* 71 F. (2d) 622 (C. C. A. 9th); *Title & Trust Co.* v. *Wernich,* 68 F. (2d) 811 (C. C. A. 9th); *In re Meifert,* 57 F. (2d) 861 (C. C. A. 6th); *Buessel* v. *United States,* 258 Fed. 811 (C. C. A. 2d). It is immaterial that the record contains a statement to the effect that the evidence printed therein has been examined and found correct by counsel. *Carson* v. *Hurt,* 250 Fed. 30, 33 (C. C. A. 5th). This principle is closely analogus to the rule in proceedings at law that no questions arising on a bill of exceptions will be considered if the bill is not authenticated by the district judge. *Origet* v. *United States,* 125 U. S.

240; *Malony* v. *Adsit*, 175 U. S. 281; *Ohl & Co.* v. *Smith Iron Works*, 288 U. S. 170; *United States* v. *King & Howe*, 78 F. (2d) 693 (C. C. A. 2d). See also *Krauss Bros. Co.* v. *Mellon*, 276 U. S. 386, 390. And in the absence of a properly authenticated record an appellate court is justified in dismissing an appeal. *Blitz* v. *Brown*, 7 Wall. 693; *Campbell* v. *Read*, 2 Wall. 198; *Ruby* v. *Atkinson*, 93 Fed. 577 (C. C. A. 5th); *Meyer* v. *Mansur & Tebbetts Implement Co.*, 85 Fed. 874 (C. C. A. 5th).

It is true, as petitioner points out (Br. 14), that in *Interstate Folding Box Co.* v. *Empire Box Corp.*, *supra*, and in *Title & Trust Co.* v. *Wernich*, *supra*, the appellate court, after stating the rule that the decree should be affirmed in the absence of a properly certified statement of evidence, went on to say that an examination of the evidence disclosed that it supported the decree of the lower court. This was done in the *Wernich* case to avoid putting the appellant to useless expense, and was accompanied by a warning that a failure to comply with the rule in future cases would prevent an appellant from securing a ruling on the issues he wished to raise. In *Trust Co. of Florida* v. *Gault*, *supra*, where there was a reversal, the court ruled on questions raised by the pleadings and findings of fact and declined to consider the evidence.

However, petitioner urges that the issues raised by the appeal to the court below could have been decided by it upon those portions of the record which were properly before it. These are said to

be (a) the order of adjudication in bankruptcy (R. 2); (b) the Government's claim for income taxes (R. 3–5); (c) the objections to this claim, filed by the trustee (R. 6–7); and (d) the decision of the District Court disaffirming the order of the special referee (R. 114–115).

The two questions raised before the court below as disclosed by the assignment of errors (R. 119–122), were, first, whether the taxpayer corporation realized a taxable profit on the transfer of certain assets, having a depreciated cost of $346,106.87,[2] to a bank in return for the taxpayer's cancelled notes in the amount of $650,000,[3] and second, whether a prior decision of the Board of Tax Appeals was *res judicata* on that issue. Obviously, no decision could be made on the first of these issues without a full consideration of the evidence. Petitioner does not contest this. He does urge, however, that the decision on the second point can be considered as separate, and can be decided without a reference to anything but the four items mentioned above.

The question whether the District Court was bound by the decision of the Board of Tax Appeals

[2] This figure is not in the assignments of error. See the Board of Tax Appeals' opinion (R. 12) and the District Court's opinion (R. 140).

[3] This question relates to the tax liability for the fiscal year 1927. The fiscal years 1928 and 1929 are also involved because, if the taxpayer's contentions as to 1927 are upheld, the return for 1927 will disclose a net loss which is deductible in 1928 and 1929.

is more than a pure question of law. The court would be required to determine several preliminary questions of fact: what were the issues before the Board; what was determined by the Board; were the same parties involved in that case as in the present case. See *Southern Pacific R. R. Co.* v. *United States,* 168 U. S. 1, 25. These facts could have been ascertained only by examining the statement of evidence. They are not set out, or even adverted to, in any of the four items upon which petitioner here relies.

Nor could the court below assume that the facts would all be determined in favor of the Government, so that only the issue of law would remain for decision. Petitioner, in asking it to do so, is asking that it decide a wholly hypothetical question—a decision beyond its power as a constitutional court.

Petitioner does not contend (Br. 12) that the court below could utilize as facts the statements contained in the opinion of the District Court (R. 138–153), and it is clear that they cannot be so utilized. The opinion was, it is true, brought before the Circuit Court of Appeals by a special order (R. 135), but the District Judge did not adopt its opinion as findings of fact. In the absence of such an adoption, facts stated in the opinion are not findings of fact and are not a part of the record. *Western Powder Co.* v. *Brewerton Coal*

Co., 81 F. (2d) 85 (C. C. A. 7th); *Southwestern Bell Telephone Co.* v. *San Antonio*, 75 F. (2d) 880 (C. C. A. 5th), certiorari denied, 295 U. S. 754; *Edwards* v. *Holland Banking Co.*, 75 F. (2d) 713 (C. C. A. 8th); *Parker* v. *St. Sure*, 53 F. (2d) 706 (C. C. A. 9th). See *United States* v. *Robert Esnault Pelterie*, No. 41, October Term, 1936, decided Dec. 7, 1936. Consequently, the record, we submit, presented no substantial question of law.

B. The court below did not err in refusing to remand the case to the District Court in order that the statement of evidence might be properly authenticated

Petitioner urged, in a petition for rehearing, that the court below remand the case to the District Court for a settlement and authentication of the transcript, in the event that the court concluded that the record before it was inadequate for any decision. He now raises the same issue here, and cites, as supporting his contention, the decision of this Court in *Barber Asphalt Co.* v. *Standard Co.*, 275 U. S. 372, and the decisions of the court below in *Sommer* v. *Rotary Lift Co.*, 66 F. (2d) 809 and *Struett* v. *Hill*, 269 Fed. 247. Each of the cases is clearly distinguishable, and, we submit, none has any bearing on the present issue.

In the *Barber Asphalt Co.* case, *supra*, the record did not lack the authentication required by Rule

75 (b), but, instead, failed to conform to another requirement of that rule relating to the condensation of the record and the preparation of a narrative statement of the evidence. This Court, implying that a failure to comply with Rule 75 (b) should not, in general, be condoned, held that the action of the Circuit Court of Appeals for the Seventh Circuit in dismissing the appeal was too harsh a penalty, in view of the fact that that court had previously permitted violations of the rule.

If this were a case involving simply a failure to reduce the evidence to narrative form, it would be necessary to admit that no consistent practice has been established by the courts. See, *e. g., Newton* v. *Consolidated Gas Co.,* 258 U. S. 165, 174; *Houston* v. *Southwestern Tel. Co.,* 259 U. S. 318; *Yangtsze Rapid S. S. Co.* v. *Deutsche-Asiatische Bank,* 59 F. (2d) 8 (C. C. A. 9th); *Zurich Co.* v. *Mid-Continent Corp.,* 43 F. (2d) 355 (C. C. A. 10th); *Hard & Rand* v. *Biston Coffee Co.,* 41 F. (2d) 625 (C. C. A. 8th); *Moss* v. *Gilchrist-Fordney Co.,* 24 F. (2d) 931 (C. C. A. 5th); *In re Wilson,* 16 F. (2d) 177 (C. C. A. 7th). With these cases compare *Alexander* v. *Cosden Pipe Line Co.,* 290 U. S. 484; *Cossack* v. *United States,* 63 F. (2d) 511 (C. C. A. 9th); *In re General Equity Rule 75,* 222 Fed. 884 (C. C. A. 6th).

But this is not a case of failure to condense the evidence; it is a case of a failure to secure its

authentication. We submit that such a record does not allow the appellate court to review any question which requires that the evidence be examined. See cases cited at pp. 11–12, *supra.*

Nor is *Struett* v. *Hill, supra,* contrary to these decisions. That case involved the question whether the District Judge was justified in refusing to approve the statement of evidence presented to him after the expiration of the term, a petition for appeal, bond, assignments of errors and citation having been filed shortly before the term expired. The Circuit Court of Appeals held merely that the expiration of the term at which the decree was rendered did not deprive the court of power to approve the statement of evidence. We do not see that that case has any application here.

There are, it is true, two instances in which the court below has remanded the case to the District Court for proper certification of the transcript. *Sommer* v. *Rotary Lift Co.,* 66 F. (2d) 809; *Lee Hin* v. *United States,* 72 F. (2d) 60. In each of these cases, however, there were special circumstances present which are not shown here.

In the *Sommer* case, the chief objections to the transcript were that it was not condensed and that it included a mass of irrelevant material, and the case was remanded in order that the evidence could be condensed and the irrelevant portions omitted. The statement of evidence had not been

formally approved by the trial judge, and this defect was also to be corrected. However, the District Court had entered an order upon objection to the praecipe (p. 810) authorizing the appellant "to include as a part of the printed record on appeal the reporter's transcript of proceedings on motion for preliminary injunction and all proceedings on all other motions, hearings and matters reported and of which a transcript was prepared." The court had, in other words, given its approval to the record, and the failure formally to approve the statement of the evidence was not a substantial departure from the rule. Here, on the contrary, there is nothing to advise the court below that the contents of the statement of evidence had the approval of the trial judge.

Special circumstances were also present in the *Lee Hin* case, *supra*. There the same attorney had appealed another case shortly before, in which his appeal had been dismissed for want of a bill of exceptions. *Chang Chow* v. *United States,* 53 F. (2d) 637. This Court reversed that decision, holding that no bill of exceptions was required, but remanded the case to the court below to determine whether the record had been properly authenticated, and if it had not, in its discretion to remand it to the District Court for authentication. 286 U. S. 530. The court below, thereupon reversed the decision of the District Court without requiring a further certificate, apparently for the reason

that no question of authenticity had been raised except by this Court. 63 F. (2d) 375. See *Lee Hin* v. *United States, supra,* at p. 61. Whether the attorney in the *Lee Hin* case could have corrected the transcript in that case after he learned of the objection to his procedure in the *Chang Chow* case does not appear, but apparently the court below felt that the same rule should be applied to the identical situations in the two cases.

In any event, the question of remanding the case to the District Court was one addressed to the sound discretion of the court below. *Barber Asphalt Co.* v. *Standard Co.,* 275 U. S. 372, 384; *Chang Chow* v. *United States,* 286 U. S. 530. There is no showing of an abuse of discretion here. When the equity rules were first adopted the courts were naturally reluctant to deal summarily with infractions. As early as 1914, however, the Circuit Court of Appeals for the Sixth Circuit pointed out that drastic penalties would attend disregard of the rules after the period of transition. *In re General Equity Rule 75,* 222 Fed. 884. In several quite recent cases, one in the court below, the evidence has been wholly disregarded, resulting in a dismissal unless some other question was involved which could be decided without the evidence. *Walker* v. *Lee,* 71 F. (2d) 622 (C. C. A. 9th); *Chickasaw Wood Products Co.* v. *Paysinger,* 84 F. (2d) 476 (C. C. A. 8th); *Trust Co. of Florida* v.

Gault, 69 F. (2d) 133 (C. C. A. 5th); *In re Meifert*, 57 F. (2d) 861 (C. C. A. 6th). This Court has also added the weight of its views to the need for meticulous compliance with the rules. *Barber Asphalt Co.* v. *Standard Co., supra; Fairbanks, etc., Co.* v. *American Co.*, 276 U. S. 305; *Local 167* v. *United States*, 291 U. S. 293, 296.

In 1934, the court below again called the matter of authentication to the attention of the bar. *Title & Trust Co.* v. *Wernich*, 68 F. (2d) 811. In view of this long period of tolerance and the repeated warnings, it cannot now be said that the court below was unjustified in now insisting that a failure to comply with the rule, no justification being shown, should not be condoned.

II

IF THE ISSUE OF RES JUDICATA IS PROPERLY BEFORE THIS COURT, IT SHOULD BE HELD THAT THE DECISION OF THE BOARD OF TAX APPEALS IS BINDING ON THE BANKRUPTCY COURT

If the error of the court below was in failing to remand the case to the District Court for a proper statement of evidence, it seems clear that the case should now be remanded to the court below with instructions to proceed in that fashion. In that event, the merits of petitioner's claim need not be considered by this Court until they have been passed upon by the Circuit Court of Appeals. If, however, the court below erred in not deciding the issues on the merits upon the record before it, the

questions are also properly before this Court. As we have stated above (pp. 14–15), we believe that the precise issue cannot be defined from the record properly before the Court, and that the only issue could be whether a decision of the Board of Tax Appeals could ever be *res judicata* in a bankruptcy court. However, in the event that the Court concludes to the contrary, and because the petition for certiorari raises the general question, we proceed to discuss it.

There is no doubt but that under Section 64 (a) of the Bankruptcy Act (*infra,* p. 39), the bankruptcy court has authority to hear and determine any question as to the amount or legality of a tax owed by a bankrupt. The Government is required to file its claim as would any other claimant, and have the merits of its claim determined. *In re Anderson,* 279 Fed. 525 (C. C. A. 2d). The question, then, is not the extent of the court's jurisdiction, but whether, in view of Section 274 (a) of the Revenue Act of 1928 (*infra,* p. 43), its jurisdiction is exclusive in a case where the petition is filed with the Board prior to the adjudication in bankruptcy. If there is concurrent jurisdiction in such a case, the further question arises whether, if the Board's decision is rendered first, that decision is *res judicata* on the bankruptcy court.

There can be no question under Section 274 (a) that the Board of Tax Appeals has no jurisdiction to entertain a petition for the redetermination of

the deficiency of one already adjudged a bankrupt. *In re Clayton Magazines*, 77 F. (2d) 852 (C. C. A. 2d); *Plains Buying and Selling Association* v. *Commissioner*, 5 B. T. A. 1147. However, Section 274 (a) also provides that a claim for a deficiency may be presented for adjudication to the bankruptcy court "despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board." This phrase, we submit, without more, implies that the Board does not lose jurisdiction already acquired. No provision is made for the dismissal of proceedings pending before the Board. It would seem to follow that if the Board's jurisdiction is properly invoked, it may be retained, and when its decision is rendered first, it is conclusive.

But if there were any doubt as to the meaning of Section 274 (a), the legislative history of the section supports this construction.[4] It shows clearly the intention of Congress to provide that, when a petition has already been filed with the Board prior to the adjudication in bankruptcy, the Board and the bankruptcy court are to have concurrent jurisdiction, and if the Board's decision is rendered first, the bankruptcy court is expected to follow it.

Section 274 first appeared in the Revenue Acts as Section 282 (a) of the Revenue Act of 1926. The provision was introduced in the Senate, and as in-

[4] The legislative history of the provision is set out in detail in the Board's decision in *Plains Buying and Selling Association* v. *Commissioner*, 5 B. T. A. 1147.

troduced provided in part as follows (H. R. 1, 69th Cong., 1st Sess., p. 149):

> Claim for the deficiency may be presented to the court before which the bankruptcy or receivership proceeding is pending, for adjudication in accordance with law. If any proceeding for redetermination of such deficiency under the provisions of this Act is pending before the Board at the time of such adjudication of bankruptcy or appointment of a receiver and no decision of the Board, final or otherwise, has been rendered therein, then such proceeding shall be dismissed by the Board.

In reporting this provision to the Senate the Senate Committee on Finance said (S. Rep. 52, 69th Cong., 1st Sess., p. 31):

> Section 282: During bankruptcy proceedings or State or Federal receivership proceedings, the assets of the taxpayer are placed within the control of the bankruptcy court or the court of equity in which the receivership proceedings are instituted, whenever the taxpayer has been finally adjudicated a bankrupt or the receiver has been finally appointed. If during the pendency of the bankruptcy or receivership proceeding, a proceeding is pending before the board or on appeal therefrom for the redetermination of a deficiency, the Commissioner of Internal Revenue would, despite a favorable decision for the Government, be unable to assess and distrain upon

the assets under the control of the bankruptcy or equity court. The section therefore provides, in case of determination of deficiency, that if petition for redetermination therefor has not been presented to the board, the deficiency shall be assessed and the claim presented to the bankruptcy or equity court. If petition for a redetermination has been presented to the board but is not on appeal therefrom, the proceedings shall be dismissed and the deficiency assessed and claim therefor presented to the bankruptcy or equity court. If proceedings for determination of a deficiency are on appeal before the Circuit Courts of Appeal or the United States Supreme Court, the committee deems it advisable to permit these courts finally to determine the deficiency rather than dismiss the proceeding. Pending such final decision on appeal, claim for the amount of the deficiency may be presented to the bankruptcy or equity court in the amount allowed by the board, or if decision is reached by such appellate courts prior to the termination of the receivership or bankruptcy proceedings, then such claim may be modified to accord with the decision.

* * * * *

Thus, when the provision was introduced in the Senate it was contemplated that any proceeding pending before the Board at the time of the adjudication of bankruptcy should be dismissed.

This provision, however, was changed in the course of the passage of the bill to read, in so far as it is material, in the same way as the provision here under consideration (Sec. 274 (a)). In explanation of the changed provision the Conference Report (H. Conference Rep. 356, 69th Cong., 1st Sess., pp. 45–46) states:

> Amendment No. 89: The Senate amendment adds a new section, the House bill containing no corresponding provisons. The House recedes with an amendment making a clerical change. The provisions of the Senate amendment are summarized in the following paragraphs.
>
> During bankruptcy proceedings or State or Federal receivership proceedings the assets of the taxpayer come within the control of the bankruptcy or equity court whenever the taxpayer has been finally adjudicated a bankrupt by the bankruptcy court or the receiver has been finally appointed by the equity court. If a deficiency is determined by the commissioner during the pendency of such proceedings, the amendment permits the deficiency to be assessed and the bankruptcy or receivership proceedings to continue despite the prohibitions of section 274 (a). *If a petition for the redetermination of a deficiency has been filed with the board prior to the adjudication of bankruptcy or the appointment of a receiver, the amendment permits the proceedings for the redetermination of the deficiency to be*

continued simultaneously with the bankruptcy or receivership proceedings. The claim for the amount of the deficiency may, of course, be filed with the bankruptcy or equity court. In case of final decision of the board before termination of the bankruptcy or receivership proceedings, a copy of the decision could be filed with the bankruptcy or equity court and the decision would presumably be followed by such courts. During the pendency of the bankruptcy or receivership proceedings a deficiency may be assessed in accordance with the final decision of the board, but the amount thereof may not be collected by distraint against the assets while under the jurisdiction of the bankruptcy or equity court.

The bankruptcy and receivership proceedings do not foreclose any unsatisfied portion of the claim of the United States and such portion may be collected by distraint or otherwise within six years after the termination of the bankruptcy or receivership proceedings. In case the final decision on appeal from the board in a proceeding for redetermination of a deficiency is reached after termination of the bankruptcy or equity proceedings, such portion of the deficiency allowed as has not already been satisfied may likewise be collected by distraint or otherwise within six years after the termination of the bankruptcy or receivership proceedings. [Italics supplied.]

It is clearly evident from this legislative history that Congress intended the Board to continue its consideration of the merits of the tax if the petition had been filed before the bankruptcy proceedings began. Congress realized, however, that a timely claim had to be filed in the bankruptcy court, or the decision of the Board when finally rendered would be ineffective to save the tax because of the likelihood that the bankrupt estate would already have been distributed. It was doubtful, however, if a claim could have been filed without some specific statutory authority, because in the ordinary case the Government was precluded from taking any action in court to collect a tax which was under consideration by the Board of Tax Appeals. Sec. 272 (a), Revenue Act of 1928. The language of Section 274 (a), therefore, authorizing the presentation of claims to the bankruptcy court "despite the pendency of proceedings for the determination of the deficiency in pursuance of a petition to the Board", constitutes that authority. It does not, we submit, support the contention that the Board's jurisdiction was to cease upon an adjudication in bankruptcy. On the contrary, it was designed to assure the collection of any deficiency the Board might determine.

In view of this legislative history, the Board of Tax Appeals has consistently held that where it has acquired jurisdiction prior to the adjudication in

bankruptcy, it will not dismiss the proceedings before it upon the adjudication. *Plains Buying and Selling Association* v. *Commissioner,* 5 B. T. A. 1147; *Hoffman* v. *Commissioner,* 7 B. T. A. 303; *Cunningham* v. *Commissioner,* 20 B. T. A. 428. The Commissioner likewise, in his regulations (see Art. 1191, Regulations 74, *infra,* p. 47) has assumed that the Board should not dismiss a proceeding over which it has taken jurisdiction before the adjudication in bankruptcy, and that the Board and the bankruptcy court have concurrent jurisdiction in such cases. By Article 1192 (*infra,* p. 48) he has provided that in the case of a final decision of the Board before a determination of the bankruptcy proceeding a copy of the Board's decision may be filed by the Commissioner with the bankruptcy court.

There is, of course, no inherent reason why the adjudication of the liabiilty of a debtor *in personam* may not be had in some court other than that which has control of the *res. Riehle* v. *Margolies,* 279 U. S. 218, 224. It is true that that case involved an equity receivership and that this Court there pointed out that the decisions of the lower Federal courts were somewhat in conflict on the question whether a bankruptcy court was concluded by a prior decision of a State court. While this Court then found it unnecessary to determine what the correct rule should be in bankruptcy cases, we sub-

mit that the decision should be the same, at least, so far as the Board of Tax Appeals is concerned. Margolies' right to prosecute his suit was drawn from Section 265 of the Judicial Code. Here the taxpayer exercised its right under the Federal statute and invoked the jurisdiction of the Board of Tax Appeals. As an incident of Margolies' right this Court held (p. 225) that he must have the further right to have the judgment of the State court accepted in the Federal court as an adjudication of the existence of the indebtedness. We submit that it is similarly appropriate here that the decision of the Board of Tax Appeals be accorded the same finality. This is only the ordinary result of the application of the doctrine of *res judicata,* and there is no occasion to make an exception in a bankruptcy court unless the result would be to impair its jurisdiction over assets in its custody.

In *Riehle* v. *Margolies, supra,* this Court rejected the contention that the application of the doctrine of *res judicata* would result in a conflict of jurisdiction, saying (p. 224):

> Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, 88–9. But the judgment of the state court does not purport to deal with the property. The sole question involved there was the existence and amount

> of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which has control of the *res*. It is only necessary that in the receivership proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them.

We submit that no sound distinction may be drawn between the situation here and that present in *Riehle* v. *Margolies, supra,* and that upon the reasoning which there prevailed the decision of the Board of Tax Appeals should be accepted here as conclusive with respect to the existence and the amount of the tax claim. This would leave to the bankruptcy court any questions concerning priority.

This conclusion is not inconsistent with Section 64 (b), of the Bankruptcy Act, which provides, in substance, that the court shall order the trustee to pay all taxes and "in case any question arises as to the amount or legality" of the tax, to hear and determine that issue. The section simply has no application, for no question concerning the amount or legality of a tax for a particular year can be said to arise where the Board has already conclusively determined the bankrupt's tax liability for that year.

While the Board's decision on January 4, 1934, preceded the appointment of a receiver on January 10, 1934 (R. 92), and the adjudication in bankruptcy on February 9, 1934 (R. 2–3), it is true that the decision of the Board did not become final until April 4, 1934, when the time for filing the petition for review with the the Circuit Court of Appeals expired. (R. 19.)[5] But the Board's decision did become final before a decision was rendered by either the referee or the bankruptcy court in this proceeding, and, in fact prior to the hearing before the referee. (R. 7.) Since it is priority of judgment that renders a decision *res judicata* (*Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716; *Larsen* v. *Northland Trans. Co.,* 292 U. S. 20; *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620), it appears that the merits of the tax had been conclusively determined prior to the time when the jurisdiction of the bankruptcy court attached.

The effect of Section 274 (a) in conferring concurrent jurisdiction on the Board and on the bankruptcy court is thus similar to that exercised by the Board and the District Courts in cases where an appeal before the Board was taken under the Revenue Act of 1924, but had not been decided prior to the Revenue Act of 1926. In *Old Colony Trust*

[5] See, also, Section 1001, as amended, and Section 1005 of the Revenue Act of 1926 (Appendix, *infra*, pp. 40–41).

Co. v. *Commissioner, supra,* this Court pointed out that, by virtue of Section 283 (b) of the Revenue Act of 1926, a taxpayer so situated had the option of paying the tax and suing in the District Court, notwithstanding his appeal to the Board. In explanation of the effect of this provision, the Court said (p. 728):

> The truth seems to be that in making provision to render conclusive judgments on petitions for review in the Circuit Courts of Appeals, Congress was not willing in cases where the Board of Tax Appeals had not decided the issue before the passage of the Act of 1926, to cut off the taxpayer from paying the tax and suing for a refund in the proper District Court. But the apparent conflict in such cases can be easily resolved by the use of the principles of *res judicata.* If both remedies are pursued, the one in a District Court for refund, and the other on a petition for review in the Circuit Court of Appeals, the judgment which is first rendered will then put an end to the questions involved and in effect make all proceedings in the other court of no avail. Whichever judgment is first in time is necessarily final to the extent to which it becomes a judgment.

In the *Old Colony Trust Co.* case the Court did, it is true, apparently have in mind a situation in which the decision of the Board had been reviewed by a Circuit Court of Appeals. However, there is

no reason to distinguish a case in which the decision of the Board has become final by reason of the failure to appeal. Decisions of the Board have frequently been accepted as *res judicata*. For example, with respect to cases arising subsequent to the Revenue Act of 1926, the statutes have provided that, with certain exceptions, the District Courts and the Court of Claims do not have authority to redetermine issues which were settled or could have been settled in previous proceedings before the Board. See Section 322 (c), Revenue Act of 1932, *infra*, p. 45. *Bankers' Reserve Life Co.* v. *United States*, 44 F. (2d) 1000 (C. Cls.), certiorari denied, 283 U. S. 836; *American Woolen Co.* v. *White*, 56 F. (2d) 716 (C. C. A. 1st); *Western Wheeled Scraper Co.* v. *United States*, 72 F. (2d) 487 (C. C. A. 7th), certiorari denied, No. 237, October 12, 1936; *Bindley* v. *Heiner*, 38 F. (2d) 489 (W. D. Pa.); *Green* v. *MacLaughlin*, 55 F. (2d) 423 (E. D. Pa.); *Warren Mfg. Co.* v. *Tait*, 60 F. (2d) 982 (Md.). But when the filing of the suit antedated the filing of the petition before the Board the doctrine of *res judicata* has been applied. *Camp* v. *United States*, 44 F. (2d) 126 (C. C. A. 4th); *Ohio Steel Foundry Co.* v. *United States*, 38 F. (2d) 144 (C. Cls.).

Petitioner relies upon *New Jersey* v. *Anderson*, 203 U. S. 483; *Commonwealth of Massachusetts* v. *Meehan*, 67 F. (2d) 638 (C. C. A. 1st) (see also *Henderson County, N. C.* v. *Wilkins*, 43 F. (2d) 670 (C. C. A. 4th)), as authority for the principle that

the bankruptcy court is not concluded by a decision of the Board. Primarily, those cases related to the conclusiveness of decisions of State tax officials. Of course, we do not urge that the Commissioner's determination was conclusive. See *In re George F. Redmond & Co.*, 17 F. (2d) 128 (Mass.); *In re W. P. Williams Oil Corp.*, 265 Fed. 401 (W. D. Ky.). The Board's decisions, however, have the effect of judgments. *Old Colony Trust Co.* v. *Commissioner, supra.* In so far as *New Jersey* v. *Anderson, supra,* and *Commonwealth of Massachusetts* v. *Meehan, supra,* held that the bankruptcy court could not be bound by a decision of the State court holding that a particular exaction was a tax, they are not in point here. See, also, *In re Heffron Co.*, 216 Fed. 642 (N. D. N. Y.). The fact that the Federal courts cannot be foreclosed from applying the Federal construction to a Federal statute is no authority for holding that a prior decision of the State court concerning the liability of the bankrupt under a statute admittedly imposing a tax would not be *res judicata.* In any event, there was no statute involved in those cases which is analogous to Section 274 (a).

Moreover, apart from the fact that the prior decision in *New Jersey* v. *Anderson, supra,* was by a state tribunal, the decision turned on both the status of the State Board of Assessors of New Jersey, whose decision was urged as a bar, and on the absence of any expressed intent of Congress to require Federal courts to abide by the decision of

such a body. One question presented in that case concerned the amount of the tax. An assessment had been made by the State Board of Assessors of New Jersey, and the question was whether its decision was conclusive in the bankruptcy court. This Court held that it was not, saying (p. 494):

> We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character * * *.

We submit that a different result is required in the present case. The Board of Tax Appeals is a quasi-judicial body (*Old Colony Trust Co.* v. *Commissioner, supra*), and wholly different from the New Jersey Board of Assessment, which corresponds to the Commissioner of Internal Revenue in the Federal tax organization. The Board of Tax Appeals corresponds quite clearly to the Prerogative Court in New Jersey. Cf. *Hill* v. *Martin*, 296 U. S. 393, 398. Moreover, the Revenue Acts clearly intend that the decisions of the Board of Tax Appeals shall be conclusive. Section 322 (c), Revenue Act of 1932, *infra*, p. 45.

There are also cases in which the suit in the State court had been filed but not decided prior to the filing of the petition in bankruptcy, or, in some cases, prior to the adjudication, where the courts may be said to have taken a different view. *In re Paramount Public Corporation*, 85 F. (2d) 42 (C. C. A. 2d); *Royal Baking Powder Co.* v. *Hessey*, 76 F. (2d) 645 (C. C. A. 4th), certiorari

denied, 296 U. S. 595; *In re James A. Brady Foundry Co.*, 3 F. (2d) 437 (C. C. A. 7th). There is no reason now to question whether these decisions conflict with the principles stated in *Richle* v. *Margolies*, 279 U. S. 218, 228, *supra*, p. 28–30. In the present case, the tax claim was decided prior to the time that the jurisdiction of the bankruptcy court attached. See *In re Anton*, 11 F. Supp. 345 (Minn.), and cases cited. See also Collier on Bankruptcy (13th Ed., 1923), Vol. 2, pp. 1389–1390.

The petitioner argues further that the doctrine of *res judicata* does not apply (1) because the bankruptcy proceeding involves the rights and claims of all creditors against the bankrupt corporation, and not merely the claim of the Government for taxes, and (2) because the parties are not the same as those before the Board.

We think there is little merit to the first contention. It is the Government's claim for taxes of the bankrupt for the years 1927, 1928 and 1929 that was involved both before the Board and before the bankruptcy court, and the same issues concerning those taxes were raised in both tribunals. The fact that other claimants have presented other claims can have no bearing upon the existence and amount of the Government's claim. The conflicting claimants are provided for by a common liquidation in one forum, the bankruptcy court. The Board of Tax Appeals did not attempt to deal with the liquidation.

Petitioner's second point is likewise without merit. *Riehle* v. *Margolies,* 279 U. S. 218, decided that the fact that the proceeding in the State court was between the creditor and the insolvent corporation, and not between the receiver and the corporation, did not prevent the receiver from being barred by the prior adjudication. The same rule should apply here. The taxpayer and the trustee were in privity and that is all that is required for the application of the doctrine of *res judicata. Riehle* v. *Margolies, supra; Mitchell* v. *First Nat. Bank of Chicago,* 180 U. S. 471. See also *Tait* v. *Western Md. Ry. Co., supra; Second Nat. Bank of Saginaw* v. *Woodworth,* 66 F. (2d) 170 (C. C. A. 6th).

We submit, therefore, that if the issue of *res judicata* is properly before this Court, it should conclude that the decision of the Board of Tax Appeals was conclusive.

III

Petitioner has, in his brief, also argued the merits of the claim for taxes. It is clear that the decision of that question requires a consideration of the evidence, and cannot be decided unless the statement is properly authenticated. Moreover, the issue was not raised in the petition for certiorari, and is not before the Court. *Helvering* v. *Taylor,* 293 U. S. 507; *Gunning* v. *Cooley,* 281 U. S. 90, 98.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended:

SEC. 25. *Appeals.*—(*a*) Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeals of the United States * * * in the following cases, to wit: * * * (3) from a judgment allowing or rejecting a debt or claim of $500 or over. * * *. (U. S. C., Title 11, Sec. 48 (a).)

SEC. 63. *Debts provable against.*—(*a*) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or * * *, absolutely owing at the time of the filing of the petition against him, * * * (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, * * *. (U. S. C., Title 11, Sec. 103.)

SEC. 64. *Debts which have priority.*—(*a*) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in the order of priority as set forth in paragraph (b) hereof: * * * and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

* * * * *

(U. S. C., Title 11, Sec. 104.)

General Order in Bankruptcy XXXVI, as amended April 17, 1933, 288 U. S. 621, 632:

APPEALS

Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in equity in courts of the United States.

Revenue Act of 1926, c. 27, 44 Stat. 9, 109, 110:

SEC. 1001. (a) [4] The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered.

* * * * *

SEC. 1005. (a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

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[4] As amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169 (U. S. C., Title 26, Sec. 642).

(3) Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

* * * * *

(U. S. C., Title 26, Sec. 640.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 272. PROCEDURE IN GENERAL.

(a) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

For exceptions to the restrictions imposed by this subsection, see—

(1) Subsection (d) of this section, relating to waivers by the taxpayer;

(2) Subsection (f) of this section, relating to notifications of mathematical errors appearing upon the face of the return;

(3) Section 273, relating to jeopardy assessments;

(4) Section 274, relating to bankruptcy and receiverships; and

(5) Section 1001 of the Revenue Act of 1926, as amended, relating to assessment or collection of the amount of the deficiency determined by the Board pending court review.

(b) *Collection of deficiency found by Board.*—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand

shall be made by the collector for the payment thereof.

* * * * *

SEC. 274. BANKRUPTCY AND RECEIVERSHIPS.[5]

(a) *Immediate assessment.*—Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the restrictions imposed by section 272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. *In such cases the trustee in bankruptcy or receiver shall give notice in writing to the Commissioner of the adjudication of bankruptcy or the appointment of the receiver, and the running of the statute of limitations on the making of assessments shall be suspended for the period from the date of adjudication in bankruptcy or the appointment of the receiver to a date 30 days after the date upon which the notice from the trustee or receiver is received by the Commissioner; but the suspension under this sentence shall in no case be for a period in excess of two years.* Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented,

[5] The sentence in italics was added by Section 505 of the Revenue Act of 1934, c. 277, 48 Stat. 680.

for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

(b) *Unpaid claims.*—Any portion of the claim allowed in such bankruptcy or receivership proceeding which is unpaid shall be paid by the taxpayer upon notice and demand from the collector after the termination of such proceeding, and may be collected by distraint or proceeding in court within six years after termination of such proceeding. Extensions of time for such payment may be had in the same manner and subject to the same provisions and limitations as are provided in section 272 (j) and section 297 in the case of a deficiency in a tax imposed by this title.

SEC. 601. BOARD OF TAX APPEALS.—PROCEDURE.

Sections 906 and * * * of the Revenue Act of 1924, as amended, are further amended to read as follows:

"SEC. 906. (a) * * *

"(d) A decision of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or

if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

* * * * *

(U. S. C., Title 26, Sec. 617 (c).)

Revenue Act of 1932, c. 209 47 Stat. 169, 242, Section 322 (c):

(c) EFFECT OF PETITION TO BOARD.—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

Revised Statutes:

> SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (U. S. C., Title 31, Sec. 191.)

United States Supreme Court Equity Rules, as amended May 31, 1932, 286 U. S. 570:

> RULE 75. RECORD ON APPEAL—REDUCTION AND PREPARATION.
>
> In case of appeal:
>
> (a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *praecipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. * * *
>
> (b) The evidence to be included in the record * * * shall not be set forth in full, but shall be stated in simple and condensed form, * * *. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the

same in the clerk's office for the examination of the other parties at or before the time of filing his *praecipe* under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 1191. *Bankruptcy and receiverships.*—During bankruptcy proceedings in Federal courts under the National Bankruptcy Act of 1898, as amended, or during equity receivership proceedings in either Federal or State courts, the court making the adjudication of bankruptcy or appointing a receiver for any taxpayer has control over the assets of such taxpayer, and the collection of taxes due can not be made by distraining while the bankruptcy or receivership proceeding is pending.
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> Collectors should, promptly after notice of outstanding liability against a taxpayer in

bankruptcy or in receivership, file claim in the appropriate court whether unpaid taxes involved have been assessed or not, except in cases where departmental instructions direct otherwise; for example, where taxes of the bankrupt or insolvent taxpayer are secured by a sufficient bond.

Under sections 3466 and 3467 of the Revised Statutes and section 64 (a) of the National Bankruptcy Act taxes take priority over claims of general creditors in cases of bankruptcy, receivership, and insolvency, and the trustee, receiver, or assignee may be held personally liable for failure on his part to protect the priority of the Government respecting taxes of which he has notice. Bankruptcy courts have complete jurisdiction under section 64 (a) of the National Bankruptcy Act to determine all disputes regarding the amount and validity of taxes of a bankrupt. Bankruptcy and receivership proceedings do not foreclose or discharge any portion of a claim of the United States for taxes which has been allowed by the court having jurisdiction over same and which remains unsatisfied after termination of the bankruptcy or receivership proceeding.

ART. 1192. *Immediate assessments in bankruptcy and receivership cases.*—Where the Commissioner has determined that a deficiency is due in respect of income tax and the taxpayer has filed a petition with the Board of Tax Appeals prior to adjudication of bankruptcy or the appointment of a receiver, the trustee or receiver appointed by the court may prosecute the taxpayer's appeal before the Board as to that particular determination. In no case shall a petition be filed with the Board for a redetermination of the deficiency after the adjudication of bankruptcy or the appointment of a receiver.

Claim for the amount of a deficiency where properly before the Board for consideration may be filed with the bankruptcy or equity court without awaiting final decision of the Board. In case of final decision of the Board before determination of the bankruptcy or receivership proceeding, a copy of the Board's decision may be filed by the Commissioner with the bankruptcy or equity court.

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U. S. GOVERNMENT PRINTING OFFICE: 1956

SUPREME COURT OF THE UNITED STATES.

No. 309.—October Term, 1936.

S. P. Kelly, Trustee in Bankruptcy for the Carlisle Packing Company, a Corporation, Bankrupt, Petitioner,
vs.
The United States of America and the Collector of Internal Revenue for the United States of America, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 1, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

In a proceeding begun January 9, 1934, the District Court, Western District of Washington, adjudged the Carlisle Packing Company bankrupt, February 9, 1934. The United States presented their claim for income taxes for 1927, 1928, and 1929, and the trustee filed objections, June 18, 1934. He asserted that the Company received no taxable income during 1927 but suffered loss sufficient to offset any gains for 1928 and 1929. The Referee received copy of the duly authenticated judgment by the Board of Tax Appeals, which sustained the tax in question, took other evidence, and upon the whole record concluded that the Company lost as averred during 1927. He disallowed the claim and explained this action by an opinion.

Exceptions challenged the Referee's refusal to treat the decision of the Tax Board as conclusive and hold the Bankruptcy Court lacked power to consider the merits of the assessments. A petition for review by the District Court alleged finality of the Board's judgment, lack of power in the Bankruptcy Court, and asked disallowance of the claim.

From an abstract of the proceedings returned by the Referee it appears—

That the United States had unsuccessfully objected to the introduction of any testimony concerning the merits of the questioned tax upon the ground that the Board's judgment in respect of the same matter had become final and conclusive.

That the bankrupt had borrowed large sums from the Bank of California, and in 1927 when unable otherwise to meet its obligations had transferred to the Bank much property and received therefor its own cancelled notes for $650,000.00. The Company claimed no profit arose from this transaction and that it sustained large loss during 1927. The Collector ruled to the contrary and assessed delinquencies for three years. The Board of Tax Appeals sustained him, approved the assessments, and adjudged accordingly, January 4, 1934. On January 12, 1934, he made summary assessments. The time for contesting the Board's judgment had not expired when petitioner was adjudged bankrupt.

Upon motion of the United States the District Court directed that the bankrupt's tax returns be made parts of the record. It then heard the cause, considered whether the decision of the Board was conclusive, and held: "To reach the conclusion that a deficiency determined by the Board of Tax Appeals may be re-examined and re-decided by the Judge of a District Court or a Referee in Bankruptcy is, on its face, inconsistent with the intent and purpose on the part of Congress shown that a review of the Board's decision should be by such an appellate court." Accordingly it rendered an opinion, disaffirmed the Referee's action, and allowed the claim.

Thereupon the trustee appealed to the Circuit Court of Appeals. Among other things he assigned as error the ruling that the Bankruptcy Court lacked power to determine anew questions which the Board of Tax Appeals had adjudicated. Portions of the record in the District Court, certified as correct by the Clerk, were filed. Counsel for the United States obtained leave to make part of the transcript the District Court's opinion. This was omitted, he said, through inadvertence only recently discovered.

It is asserted and not denied that the cause was heard by the Court without objection to the record, and that both sides treated the statement of the evidence as correct. Undoubtedly, the record

was not properly authenticated within the requirements of Equity Rules Number 75 (b)[1] and 77.[2]

Upon its own motion the Circuit Court of Appeals raised the point and decided "appellant has not complied with either of these rules, but has disregarded them both. There is no statement of the evidence, nor is there any agreed statement of the case. . In the absence of any such statement, we indulge the presumption that the evidence supports the judgment and warrants its affirmance."

The trustee asked for a rehearing, also that the record be returned to the District Court for settlement and proper authentication. Both things were denied. One of the Judges dissented, and from his unquestioned statement it appears: "Neither party raised the point on which the opinion was based. The point took its origin from the bench without suggestion from or reference to either party and in the face of extended argument and voluminous briefs based

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[1] Equity Rule 75 (b), as amended, 286 U. S. 570, 28 U. S. C. A., § 723:

"The evidence to be included in the record, except expert testimony, shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his praecipe under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statements be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly prepared, it shall be made so under the directions of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal."

[2] Equity Rule 77, 226 U. S. 672, 28 U. S. C. A., § 723:

"When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal."

upon the statement of evidence contained in the abstract." He thought the petition for rehearing should have been granted and opportunity afforded to secure proper authentication of the record.

Manifestly the Equity Rules should be enforced with the strictness necessary to effectuate their essential purpose; orderly procedure so demands. But when, as here, there is mere omission of some step which has escaped the attention of both parties, and when rigorous enforcement without fair opportunity to correct the error would defeat hearing on the merits and entail unnecessary hardship, we think appropriate relief promptly asked for should be afforded. Permission to supply authentication of the record would have occasioned no material injury to any party, nor interfered seriously with the business of the Court. In the circumstances we must regard the denial of an opportunity to amend as an abuse of discretion—a violation of the spirit if not the letter of the Rules.

The judgment of the Circuit Court of Appeals must be reversed. The cause will be remanded there for further proceedings in harmony with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.